Supreme Court, U.S.
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No. ——

IN THE
Supreme Court of the United States
OCTOBER TERM, 1995

DOOLIN SECURITY SAVINGS BANK, F.S.B.,
Petitioner,

v.

FEDERAL DEPOSIT INSURANCE CORPORATION,
Respondent.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Whether under Article III of the U.S. Constitution, the Due Process Clause of the Fifth Amendment to the U.S. Constitution, and the Federal Deposit Insurance Act, the Federal Deposit Insurance Corporation may adjudicate deposit insurance assessment disputes in which it has a direct pecuniary interest.

Whether under Article III of the U.S. Constitution, the Due Process Clause of the Fifth Amendment to the U.S. Constitution, the Administrative Procedure Act, and the Federal Deposit Insurance Act, the Federal Deposit Insurance Corporation may adjudicate disputes involving deposit insurance assessments without either formal adjudicative procedures before the agency or a trial *de novo* in the United States District Court and may then enforce its informal adjudications by terminating federal deposit insurance in a proceeding in which judicial review of the deposit insurance assessment is denied.

PARTIES TO THE PROCEEDING

All parties appear in the caption of this case. Petitioner, petitioner below, is Doolin Security Savings Bank, F.S.B., a mutual federal savings bank having no parent company and no subsidiary that is not wholly owned. Respondent, respondent below, is the Federal Deposit Insurance Corporation, an independent agency in the Executive Branch.

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PETITION FOR A WRIT OF CERTIORARI

Doolin Security Savings Bank, F.S.B. ("Doolin") petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fourth Circuit, which affirmed an order of the Federal Deposit Insurance Corporation ("FDIC") terminating Doolin's deposit insurance. The Fourth Circuit has stayed its mandate—thereby preventing a governmental seizure of Doolin—pending this Court's disposition of the case.

OPINIONS BELOW

The May 18, 1995 opinion of the court of appeals (App. 1a) is reported at 53 F.3d 1395. The June 13, 1995 order of the court of appeals denying the petitioner's request for a rehearing and suggestion for a rehearing *en banc* appears at App. 30a. The Decision and Order of the FDIC to Terminate Insured Status (App. 31a) is reported at FDIC Enforcement Decisions and Orders ¶ 5215, at p. A-2453.

JURISDICTION

The judgment of the court of appeals was entered on May 18, 1995. On May 31, 1995 Doolin timely filed a Petition for Rehearing and Suggestion for Rehearing in Banc, which was denied by the court of appeals on June 13, 1995. This Petition for a Writ of Certiorari was filed within 90 days thereafter. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL, STATUTORY, AND REGULATORY PROVISIONS INVOLVED

Pertinent provisions of the United States Constitution (Art. III § 2, cl. 1 and Am. V) are reprinted at App. 59a. Pertinent provisions of the Administrative Procedure Act ("APA") (5 U.S.C. §§ 554, 556, 557, 558, 559, 703, 704, and 706) are reprinted at App. 60a. Pertinent provisions of the Federal Deposit Insurance Act (12 U.S.C. §§ 1817(b), (c), and (g) and 1818(a) and (i)) and the FDIC's regulations thereunder (12 C.F.R. §§ 327.3 (1993) and 327.3 (1994)) are reprinted at App. 70a.

STATEMENT OF THE CASE

The FDIC set Doolin's deposit insurance premium in an arbitrary manner, without even giving Doolin prior notice, and then denied Doolin's request for a hearing. To avoid giving Doolin a hearing in an Article III court, the FDIC began an administrative proceeding. To avoid giving Doolin a hearing in that proceeding, the FDIC summarily awarded judgment to itself and terminated Doolin's deposit insurance. Thus, the FDIC, which had a direct financial stake in the dispute, has succeeded in depriving Doolin of any hearing in an Article III court or before an administrative law judge, and terminated Doolin's deposit insurance in retaliation for Doolin's efforts to get a hearing. Without deposit insurance, Doolin is subject to seizure by the government.

The FDIC is an independent agency in the Executive Branch. The FDIC funds its operations by assessments of federally insured depository institutions and their affiliates rather than through appropriations by Congress. The FDIC prepares its own budget and its Board of Directors ("FDIC Board") determines and prescribes the manner in which its obligations are incurred and its expenses allowed and paid. The FDIC administers two funds from which its expenses are paid, the Bank Insurance Fund ("BIF") and the Savings Association Insurance Fund ("SAIF"). Doolin's assessments are credited to the SAIF, which is underfunded.

Until the adoption of the Federal Deposit Insurance Corporation Improvement Act of 1991 ("FDICIA"), Pub. L. No. 102-242, 105 Stat. 2236, each insured depository institution was assessed at the same rate as any other depository institution. In the event of a dispute as to how much was owed, section 7(g) of the Federal Deposit Insurance Act, 12 U.S.C. § 1817(g) (App. 80a), created a civil action in which the FDIC could collect any assessments determined to be "lawfully payable."

Section 302 of FDICIA, 105 Stat. 2345 (App. 103a), required the FDIC to adopt regulations establishing a risk-based deposit insurance assessment system. Under 12 U.S.C. § 1817(b)(1)(C)(iii) (App. 72a), the FDIC is required to consider the revenue needs of the deposit insurance funds in connection with deposit insurance assessments. But FDICIA did not explicitly authorize anything other than a purely objective assessment system. In FDICIA, Congress did not amend either the provision in the Federal Deposit Insurance Act providing for the adjudication of deposit insurance assessment disputes in Article III courts or the provision granting the FDIC power to terminate deposit insurance.[1] *See* 12 U.S.C. §§ 1817(g) and 1818(a).

[1] FDICIA did, however, authorize the FDIC to levy fines for late or inaccurate reports, but subjected such fines to the APA procedures of 12 U.S.C. § 1818(h). *See*, section 7(c)(4) of the

Regulations were adopted by the FDIC under color of section 302(f) of FDICIA (App. 110a), and subsequently amended, both codified in Part 327 of the Regulations, 12 C.F.R. Part 327 (App. 112a). Risk-based deposit insurance assessments are based partially upon a subjective component, the "A," "B," or "C" part of the rating. There are nine risk-based categories, with "1A" being the best and "3C" being the worst.

On December 1, 1992, without prior notice or an opportunity for a hearing, the FDIC notified Doolin that it had been placed in category "1B." Doolin requested that the risk classification be changed and also requested a hearing under the APA. The initial payment under the "1B" classification was due on January 31, 1993. Doolin withheld the amount of funds in dispute pending FDIC action.

On March 25, 1993 the FDIC denied Doolin's request for a reclassification and also refused to conduct a hearing. Doolin renewed its request for a hearing and reclassification. On July 7, 1993, the FDIC denied Doolin's request for a hearing and request for a reclassification. Doolin continued to withhold the amount in dispute. By this point Doolin had withheld a total of $15,764.80.

Disdaining its remedy in district court under 12 U.S.C. § 1817(g), on November 18, 1993 the FDIC initiated a termination-of-insurance proceeding under 12 U.S.C. § 1818(a), which does not explicitly apply to the collection of deposit insurance assessments. The Federal De-

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Federal Deposit Insurance Act, 12 U.S.C. § 1817(c)(4) (App. 79a). Unlike deposit insurance assessments, these civil monetary penalties are not retained by the FDIC but are paid to the U.S. Treasury. 12 U.S.C. §§ 1817(c)(4) (App. 79a) and 1818(i)(2)(J) (App. 95a). These amendments, along with the lack of amendments to 12 U.S.C. §§ 1813(v) (App. 70a), 1817(g) (App. 80a), and 1818(a) (App. 82a) demonstrate that Congress did not consider Doolin's withholding of disputed assessments to be a "violation" for which section 1818's enforcement weapons could be brought to bear.

posit Insurance Act specifically makes formal APA hearing procedures applicable in termination-of-insurance cases. *See* 12 U.S.C. § 1818(a) and (h)(1). Specifically, 12 U.S.C. § 1818(a)(3) (App. 84a) provides that in a termination-of-insurance proceeding "all issues shall be determined on the record pursuant to section 554 of title 5." In Doolin's case, however, the FDIC had not determined Doolin's risk-based rating in a hearing on the record.

In the termination-of-insurance proceeding, the administrative law judge declined to hold a hearing on the FDIC's risk-based assessment and recommended summary disposition in favor of the FDIC, finding that the issue of the risk-based category was not material in view of Doolin's admission that it had withheld the amount of funds in dispute.

By order dated June 29, 1994, the FDIC Board issued an order terminating Doolin's federal deposit insurance because Doolin had withheld the disputed portion of its deposit insurance assessments. Thus, the FDIC ordered Doolin's deposit insurance terminated without Doolin's having had any of the following:

1. Prior notice of the FDIC's intention to hold an adjudication in which Doolin could be placed in risk-based deposit insurance category "1B";
2. An opportunity to participate in the adjudication in which Doolin was placed in risk-based deposit insurance category "1B";
3. An opportunity to confront Doolin's accusers;
4. An opportunity to cross-examine Doolin's accusers;
5. An opportunity to present evidence;
6. An opportunity to present oral argument;
7. An opportunity to have the factual issues determined in the first instance by an impartial adjudicator;

8. An opportunity to know who made the adjudication;

9. An opportunity to know the facts upon which the FDIC based Doolin's risk-based deposit insurance assessment category; and

10. An opportunity to conduct discovery.

On July 8, 1994 Doolin filed a petition for review in the United States Court of Appeals for the Fourth Circuit, which had jurisdiction of the case under 12 U.S.C. § 1818(a)(5) and (h)(2). On July 21, 1994 the court of appeals entered a stay of the FDIC's order. Doolin asked the court of appeals to hold unlawful and set aside (i) the FDIC's assessment regulation (then codified at 12 C.F.R. § 327.3) and the FDIC's risk-based deposit insurance assessments of Doolin thereunder and (ii) the FDIC's order terminating Doolin's deposit insurance.

On May 18, 1995, the court of appeals affirmed. Although it recognized that institutional pecuniary interests render adjudicators unconstitutionally biased, citing *Ward v. Village of Monroeville*, 409 U.S. 57 (1972), the court of appeals declined to follow *United Church of the Medical Center v. Medical Center Commission*, 689 F.2d 693 (7th Cir. 1982).

Without even citing this Court's decision in *United States v. First City Nat'l Bank of Houston*, 386 U.S. 361, 369 (1967), the court of appeals rejected Doolin's claim of a right to a hearing, either in an APA proceeding before the FDIC or in a trial *de novo* in district court. In so ruling, the court of appeals implicitly rejected holdings in the recent decisions of the District of Columbia Circuit in *Callejo v. RTC*, 17 F.3d 1497 (D.C. Cir. 1994), and the Ninth Circuit in *Marathon Oil Co. v. EPA*, 564 F.2d 1253 (9th Cir. 1977).

The court of appeals gave no consideration to Doolin's argument that absent specific legislation to the contrary Article III forbids the use of administrative enforcement

proceedings to collect a debt. On June 13, 1995, the court of appeals declined to rehear the case.

Doolin is subject to seizure and closing by the FDIC under 12 U.S.C. §§ 1464(d)(2)(A) and 1821(c)(5)(J) unless this Court reverses the decision of the court of appeals.

REASONS FOR GRANTING THE WRIT

The court of appeals has erroneously decided several questions of considerable and continuing public importance, in a manner that conflicts with decisions of this Court and three other circuits. In addition to being plainly inconsistent with all of the case law on the issue of the facial constitutionality of adjudications by financially interested adjudicators, the decision of the court of appeals authorizes the FDIC to evade the hearing procedures of the APA and the Federal Deposit Insurance Act, effectively empowering the FDIC to use informal administrative adjudications to carve out issues that would otherwise be decided initially by disinterested administrative law judges. The decision of the court of appeals thus promises to eviscerate the due process procedures Congress has required not only in termination-of-insurance proceedings, but also in cease-and-desist, removal and prohibition, and civil monetary penalty proceedings under 12 U.S.C. § 1818(b), (e), and (i).

I. THE FOURTH CIRCUIT'S FAILURE TO DISQUALIFY A DECISIONMAKER HAVING A DIRECT PECUNIARY INTEREST IN THE ADJUDICATION CONFLICTS WITH DECISIONS OF THIS COURT AND OF THE SEVENTH CIRCUIT IN *UNITED CHURCH OF THE MEDICAL CENTER v. MEDICAL CENTER COMMISSION.*

The decision of the court of appeals below conflicts with the decision of the Seventh Circuit in *United Church of the Medical Center v. Medical Center Commission*, 689 F.2d 693, 700 (7th Cir. 1982), and with this

Court's decisions in *Ward v. Village of Monroeville, Ohio*, 409 U.S. 57 (1972), and *Tumey v. Ohio*, 273 U.S. 510 (1927). These cases hold that due process requires the disqualification of a decisionmaker having a direct pecuniary interest in the outcome of an adjudication.

This Court has found due process violations where a governmental body has a pecuniary interest and an individual who is the decisionmaker has "responsibilities [that] may make him partisan," toward the governmental body, *Ward v. Village of Monroeville, Ohio*, 409 U.S. 57, 60 (1972). Due process is also violated where a decisionmaking body has no direct financial interest, but its members have a "possible personal interest" that is a "pecuniary interest," *Gibson v. Berryhill*, 411 U.S. 564, 579 (1973), or where an individual decisionmaker has a "direct personal pecuniary interest" because decisionmaker benefits when the governmental unit benefits. *Tumey v. Ohio*, 273 U.S. 510, 523 (1927).

The fountainhead of this Court's pecuniary bias precedents was the common law of England, to which this Court adverted in *Tumey*: "[I]t is very clear that *the slightest pecuniary interest* of any officer, judicial or quasi judicial, in the resolving of the subject-matter which he was to decide, rendered the decision voidable." 273 U.S. at 524 (emphasis added). As *Tumey* also noted, "There was at the common law the greatest sensitiveness over the existence of *any pecuniary interest however small or infinitesimal* in the justices of the peace." *Id.* at 525 (emphasis added).

In *Ward*, this Court applied *Tumey* to a situation in which a "mayor's executive responsibilities for village finances may make him partisan to maintain the high level of contribution from the mayor's court," holding that the mere existence of such a possibility "necessarily involves a lack of due process." 409 U.S. at 60. In

Gibson, this Court extended *Tumey* and *Ward* to administrative adjudications, affirming a three-judge court's conclusion that "the [possible] pecuniary interest of the members of the [Alabama] Board of Optometry had sufficient substance to disqualify them." 411 U.S. at 579.

Applying *Gibson* and *Ward*, in *United Church of the Medical Center v. Medical Center Commission*, 689 F.2d 693, 699 (7th Cir. 1982), the Seventh Circuit held that the reverter hearing provisions in an Illinois statute violated due process because the statute created a commission that had "a stake in the outcome" of its own hearing. The Medical Center Commission had powers of eminent domain within the Medical Center District except with respect to property owned by a religious organization and used for an exclusively religious purpose. The Commission had deeded a parcel of land to a religious foundation, subject to a reversionary interest in the Commission. Later, the Commission authorized reverter proceedings before itself and appointed one of its employees as hearing officer. Relying upon *Gibson*, the Seventh Circuit found a due process violation because the Commission, which served as the judge in the reverter proceedings, had "a stake in the outcome of the hearing." 689 F.2d at 699.

The Seventh Circuit's decision in *United Church* was discussed approvingly in *Hammond v. Baldwin*, 866 F.2d 172 (6th Cir. 1989), in which the Sixth Circuit rejected a due process challenge that was based upon nothing more than "a general tendency of an administrative agency to serve the executive under which it derives its authority." *Id.* at 176. In *Hammond*, the Sixth Circuit took great care to follow this Court's decisions in *Gibson* and *Ward*, repeatedly focusing on this Court's use of the adjectives "pecuniary" and "financial." The Sixth Circuit held that "the entire government . . . cannot be disqualified from decisionmaking on grounds of bias when all that is alleged is a general bias in favor of the alleged state interest or

policy." 866 F.2d at 176. The Sixth Circuit's discussion in *Hammond* indicates that both of the factors it cited, a "general bias" rather than a pecuniary bias and the potential disqualification of the "entire government of a state," were necessary to its holding that due process was not violated.

In declining to follow *United Church*, the court of appeals below purported to follow *Hammond*. But the Sixth Circuit's studied emphasis upon this Court's use of the terms "pecuniary" or "financial" and the Sixth Circuit's clear and considered reference to the "specialized, separately incorporated, self-contained unit of the state," 866 F. 2d at 177, that had been involved in *United Church* demonstrate that under the Sixth Circuit's rationale in *Hammond*, as under the Seventh Circuit's decision in *United Church*, the pecuniary interest of the FDIC, a "specialized, separately incorporated, self-contained unit" of the federal government, would result in a violation of due process. Thus, *Hammond* is fully consistent with *United Church*, but irreconcilable with the decision of the court of appeals below.

One basis upon which the court of appeals below attempted to distinguish *United Church* was that because Doolin was unable to "isolate certain decisionmakers and indicate reasons why those particular adjudicators [were] biased," App. at 24a, there was only "general institutional [2] bias in favor of the . . . interest or policy," App. 23a, citing *Hammond*, 866 F.2d at 177. In *Hammond*, however, there was no "Commission . . . with a direct financial stake in the outcome." *United Church*, 689 F.2d at 699. Indeed, the Sixth Circuit in *Hammond* had very carefully noted that it did not disagree with the Seventh Circuit's decision in *United Church*. 866 F.2d at 177. The FDIC's failure to rely upon *Hammond* in its brief to

[2] The word "institutional" did not appear in the *Hammond* opinion.

the court of appeals below is a further demonstration that *Hammond* provides no support for the proposition that a federal agency can constitutionally award a judgment to itself. Nor was the court of appeals below able to cite any authority upholding a decision made by an adjudicator with a financial stake in the adjudication.

A second basis upon which the court of appeals below attempted to distinguish *United Church* was the totally incorrect impression that the FDIC's insurance assessments, which are retained by the FDIC, are akin to civil monetary penalties. Those penalties are deposited into the U.S. Treasury. 12 U.S.C. §§ 1817(c)(4) and 1818(i)(2)(J) (App. 79a, 95a).

In 1993 this Court twice reaffirmed the principles announced in *Tumey* and reiterated in *Ward*. In *Concrete Pipe and Products of California, Inc. v. Construction Laborers Pension Trust for Southern California*, 113 S. Ct. 2264 (1993), this Court specifically noted that "due process requires a 'neutral and detached judge in the *first instance*,'" *id.* at 2277 (emphasis added), citing *Ward*, 409 U.S. 57, 61-62 (1972), and that "[e]ven appeal and a trial *de novo* will not cure a failure to provide a neutral and detached adjudicator," *id.*, again citing *Ward*, 409 U.S. at 61. More recently, this Court held a civil forfeiture unconstitutional as applied, noting, "The purpose of an adversary hearing is to ensure *the requisite neutrality that must inform all governmental decisionmaking*. That protection is of particular importance . . . where the Government has a direct pecuniary interest in the outcome of the proceeding." *United States v. James Daniel Good Real Property*, 114 S. Ct. 492, 502 (1993) (emphasis added).[3]

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[3] In *United Church*, the Seventh Circuit held that "the disqualifying financial stake need not be 'direct or positive'." 689 F.2d at 700, citing *Ward*.

II. THE FOURTH CIRCUIT'S FAILURE TO REQUIRE AN EVIDENTIARY HEARING AT ANY STAGE OF THIS CASE CONFLICTS WITH DECISIONS OF THIS COURT AND THE NINTH AND DISTRICT OF COLUMBIA CIRCUITS.

The decision of the court of appeals below conflicts with the decision of the District of Columbia Circuit in *Callejo v. RTC*, 17 F.3d 1497 (D.C. Cir. 1994), which followed *Coit Independence Joint Venture v. FSLIC*, 489 U.S. 561, 572 (1989), and with this Court's decisions in *Coit* and *United States v. First City Nat'l Bank of Houston*, 386 U.S. 361 (1967). The foregoing cases hold that a party to an administrative agency adjudication has a right to an evidentiary hearing at some point, either a formal hearing before the agency or a trial *de novo* in district court. The decision below also conflicts with the Ninth Circuit's decision in *Marathon Oil Co. v. EPA*, 564 F.2d 1253 (9th Cir. 1977), which under the facts of this case would require an APA hearing at the agency if the Due Process Clause permitted the FDIC to adjudicate the dispute.

A. The Fourth Circuit's Failure To Require A Trial *De Novo* Conflicts With The Decisions Of This Court And The District Of Columbia Circuit's Decision In *Callejo v. RTC*.

The informal procedures the FDIC adopted for risk-based deposit insurance adjudications supplant the APA's formal hearing procedures. Assuming *arguendo* that Congress has authorized the FDIC to supplant the APA, then the Court of Appeals below should have followed the District of Columbia Circuit's decision in *Callejo v. RTC*, 17 F.3d 1497 (D.C. Cir. 1994), which holds that in the absence of formal agency procedures a party to an administrative agency adjudication cannot be deprived of a right to a trial *de novo* in the United States District Court. Although the court of appeals below failed to

cite *Callejo*, it expressly declined to follow the District of Columbia Circuit's holding.

Applying a statute that is administered by both the FDIC and the Resolution Trust Corporation ("RTC"), the District of Columbia Circuit held in *Callejo* that where Congress provides two alternatives, one of which involved formal adjudications and one that did not, the agency's failure to provide formal adjudicative procedures meant that its informal adjudication would be subject to a trial *de novo* in United States District Court:

> If [the RTC] is willing to prescribe regulations setting up [formal] adjudicative procedures, the Corporation can go ahead and finally "resolve" disputed claims for insurance coverage and review of its resolutions will proceed in the courts of appeals under the deferential standards of the APA. . . . In the absence of such procedures, the Corporation's . . . decision can give rise only to an original action in district court.

17 F.3d at 1499. Absent such formal procedures, the District of Columbia Circuit held, the Federal Deposit Insurance Act "calls for a *de novo* trial [as distinguished from *de novo* review] in district court." *Id.* at 1501 & n.3.

The decision of the court of appeals below that Doolin can have its deposit insurance terminated without either a hearing before the agency or a trial *de novo* is revolutionary. *Cf. United States v. First City Nat'l Bank of Houston*, 386 U.S. 361, 368 (1967) (requiring a trial de novo where a statute merely provided for "review de novo"):

> Moreover, the Comptroller's action is informal, no hearing in the customary sense having been held . . . and none being required by Congress in the 1966 Act. We would therefore have to assume that Congress made a revolutionary innovation by making administrative action well nigh conclusive, even

> though no hearing had been held and no record in the customary sense created.

See also H.R. Rep. No. 1980, 79th Cong., 2d Sess. 45-46 (1946), *reprinted in* Admin. L.2d (P & F) Deskbook Statutes 86 (1952):

> In short, where a rule or order is not required by statute to be made after opportunity for agency hearing and to be reviewed solely on the record thereof the facts pertinent to any relevant question of law must be tried and determined de novo by the reviewing court respecting either the validity or application of such rule or order—because facts necessary to the determination of any relevant question of law must be determined of record somewhere and, if Congress has not provided that an agency shall do so, then the record must be made in court.

See also 5 U.S.C. § 554(a)(1).

B. The Fourth Circuit's Failure To Require An APA Hearing Conflicts With The Decisions Of This Court And The Ninth Circuit's Decision In *Marathon Oil Co. v. EPA.*

The FDIC's procedures for risk-based deposit insurance adjudications supplant jurisdiction in the district court, contrary to 12 U.S.C. § 1817(g). Assuming *arguendo* that the FDIC has constitutional and statutory authority to conduct adjudications in risk-based deposit insurance assessment disputes, then the court of appeals below should have followed the Ninth Circuit's decision in *Marathon Oil Co. v. EPA*, 564 F.2d 1253, 1262 (9th Cir. 1977), which holds that when federal administrative agency proceedings are "conducted in order 'to adjudicate disputed facts in particular cases,' not 'for the purpose of promulgating policy-type rules or standards,' " the formal adjudicatory hearing provisions of the APA are applicable. Although the court of appeals below failed to cite *Marathon*, it expressly declined to follow Ninth Circuit's holding.

In failing to follow *Marathon*, the court of appeals below implicitly assumed that the FDIC had the power to supplant the APA. This is not an assumption that should have been made lightly. *E.g., Director, Office of Workers' Compensation Programs, Dept. of Labor v. Greenwich Collieries*, 114 S. Ct. 2251, 2254 (1994) ("We do not lightly presume exemptions to the APA . . . ."); *Marcello v. Bonds*, 349 U.S. 302, 310 (1955) ("Exemptions from the terms of the Administrative Procedure Act are not lightly to be presumed in view of the statement in § 12 of the Act [current version at 5 U.S.C. § 559] that modifications must be express . . . .").

In *Marathon*, the Ninth Circuit relied upon this Court's decisions in *United States v. Florida East Coast Railway Co.*, 410 U.S. 224 (1973), and *United States v. Allegheny-Ludlum Steel Corp.*, 406 U.S. 742 (1972). In *United States v. Florida East Coast Railway Co.*, 410 U.S. 224, 245 (1973), this Court recognized that although the line dividing those proceedings requiring APA hearings from those that did not might not be easily discernible in all cases, its prior decisions

> represent[ed] a recognized distinction in administrative law between proceedings for the purpose of promulgating policy-type rules or standards, on the one hand, and proceedings designed to adjudicate disputed facts in particular cases on the other.

Prior to *Florida East Coast Railway*, this Court had emphasized that APA hearings are required (i) where there is an adjudication, or (ii) where the statute requires, or (iii) where the Constitution requires. *See United States v. Allegheny-Ludlum Steel Corp.*, 406 U.S. 742, 757 (1972) ("Because the proceedings under review were an exercise of legislative rulemaking power rather than adjudicatory hearings as in *Wong Yang Sung v. McGrath*, 339 U.S. 33, 70 S. Ct. 445, 94 L. Ed. 616 (1950) . . . and because [the substantive statute] does not require a determination 'on the record' the provisions of 5 U.S.C. §§ 556 and 557 were inapplicable").

CONCLUSION

For the foregoing reasons, this Court should grant Doolin's petition for a writ of certiorari.

Respectfully submitted,

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July 17, 1995

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APPENDICES

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 94-1877

DOOLIN SECURITY SAVINGS BANK, F.S.B.,
Petitioner,

v.

FEDERAL DEPOSIT INSURANCE CORPORATION,
Respondent.

On Petition for Review of an Order of the
Federal Deposit Insurance Corporation
(93-178-A)

Argued: December 5, 1994
Decided: May 18, 1995

Before RUSSELL and MICHAEL, Circuit Judges,
and PHILLIPS, Senior Circuit Judge

OPINION

RUSSELL, Circuit Judge:

Doolin Security Savings Bank, F.S.B. (Doolin), appeals a decision by the Board of Directors of the Federal Deposit Insurance Corporation (Board) to terminate Doolin's insured status. We affirm.

I.

Doolin is a federally chartered savings association, with its principal place of business in New Martinsville, West Virginia. As an "insured depository institution" under the Federal Deposit Insurance Act (FDIA), 12 U.S.C. § 1813(c)(2), Doolin has two regulators: the Office of Thrift Supervision (OTS), which is Doolin's primary federal regulator, and the Federal Deposit Insurance Corporation (FDIC), which has supplemental authority. Doolin pays its deposit insurance assessments to the FDIC under section 7 of the FDIA, 12 U.S.C. § 1817(c)(2), and under 12 C.F.R. § 327.3 (1994).[1] The FDIC then credits the assessments to the Savings Association Insurance Fund (SAIF).

By letter dated December 1, 1992, the FDIC notified Doolin that it had assigned Doolin an assessment risk classification of "1B" for purposes of determining its annual deposit insurance rate for the six-month period beginning January 1, 1993. The notification called for an assessment of $40,651.53, due and payable on January 31, 1993. Doolin believed that its risk classification should have been "1A" rather than "1B," which would have reduced its assessment to $32,677.37.[2] Doolin asserted that the FDIC classification was erroneous because in assigning the classification, the FDIC relied in part

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[1] In an FDIC rule promulgated December 20, 1994, and effective April 1, 1995, the FDIC renumbered § 327.3 as § 327.4. 59 Fed. Reg. 67153, 67161-63 (Dec. 29, 1994).

[2] The rating Doolin received was the second best among nine possible ratings. A "1B" classification corresponded to an annual assessment of $0.26 for each $100.00 of domestic deposits. Institutions classified as "1A," the categorization Doolin believes is appropriate, pay an annual assessment of $0.23 for each $100.00 of domestic deposits. The parties do not raise the issue that the ratio of 0.23 to 0.26 does not equal the ratio of 32,677.37 to 40,651.53, but we assume for purposes of this appeal that Doolin's calculations were correct at the 1A rating.

on a 1992 OTS examination report and composite rating of Doolin, which Doolin believed were also erroneous.[3]

Doolin thus paid the FDIC $32,677.37 in January 1993 and withheld the difference. Along with its payment, Doolin submitted an altered version of its certified statement, on which Doolin submitted an annual assessment rate corresponding to a 1A classification. The FDIC notified Doolin on May 18 and July 14, 1993, that it had failed to pay its full semiannual assessment due on January 31, 1993.

The next semiannual assessment of $67,519.24 was due and payable on July 31, 1993. In July 1993, Doolin paid only $59,728.68, again based on its calculation of its assessment as if it had been classified as 1A. Doolin also submitted a second certified statement altered to correspond to a 1A classification. From its two underpayments, Doolin withheld a total of $15,764.80 of its deposit insurance assessment for 1993.

By letter dated September 14, 1993, the FDIC informed Doolin that it had notified the OTS of Doolin's underpayment of insurance premiums and that it would likely proceed under section 8(a) of the FDIA, 12 U.S.C. § 1818(a), to terminate Doolin's insured status unless Doolin remitted the full amount of the insurance premiums assessed. When Doolin continued to contest its risk classification, the FDIC formally began enforcement proceedings on November 18, 1993, pursuant to 12 U.S.C. § 1818(a)(2)(B), by issuing Doolin a Notice of Intention to Terminate its Insured Status, Findings, and

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[3] The FDIC's assessment regulations provide that "each institution will be assigned to one of the three subgroups based on the [FDIC's] consideration of the supervisory evaluations provided by the institution's primary federal regulator. . . . In addition, the [FDIC] will take into consideration such other information (such as state examination findings, if appropriate) as it determines to be relevant to the institution's financial condition and the risk posed to the . . . SAIF." 12 C.F.R. § 327.3(e)(1)(ii).

Order Setting Hearing. The Notice stated that Doolin had failed to pay the full amount of its semiannual assessments for 1993 in violation of section 7(c)(1) of the FDIA, 12 U.S.C. § 1817(c)(1), and 12 C.F.R. § 327.3. On November 24, 1993, Doolin filed its answer and request for a jury trial.

The FDIC moved for summary disposition with the ALJ on January 19, 1994, pursuant to 12 C.F.R. § 308.29. Under § 308.29(a), the ALJ shall recommend a final order granting such motions when there exists "no genuine issue as to any material fact" and "[t]he moving party is entitled to a decision in its favor as a matter of law." Finding "no *material* facts in genuine issue," the ALJ issued an order on February 24, 1994, recommending summary disposition in favor of the FDIC. Joint Appendix (JA) at 295 (emphasis in original). The ALJ primarily found that Doolin had not paid its required semiannual assessments and that it was in violation of 12 U.S.C. § 1817(c)(1) and 12 C.F.R. § 327.3. The ALJ also held that his recommendation mooted Doolin's outstanding document requests on the FDIC. Doolin filed exceptions to the recommended decision on March 25, 1994.

On June 29, 1994, the FDIC Board of Directors adopted the ALJ's recommended decision, making additional findings and conclusions, and issued its final Decision and Order to terminate Doolin's insured status on summary disposition. The Board found that section 8(a) of the FDIA, 12 U.S.C. § 1818(a), authorized the FDIC to terminate the deposit insurance of an insured depository institution that violates applicable law and that Doolin violated applicable law by not paying its full insurance assessment. The Board also concluded that summary disposition was appropriate because there were no genuine issues of material fact.[4]

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[4] During the Board's review proceedings, Doolin contested factual issues principally related to the OTS composite rating and the

Doolin's primary dispute before the ALJ and the Board centered on its 1B risk classification assignment and the lawfulness of the procedures by which the FDIC determined that classification. The ALJ concluded that review of those issues was not proper in this proceeding, and the Board agreed, reasoning that Doolin's disagreement with the assessment classification was in fact basic disagreement with the OTS examination report.[5] The Board noted that Doolin was engaged in an effort to have the OTS modify its 1992 examination report but that Doolin had yet to be successful. The Board concluded that Doolin may not use this termination of insurance proceeding to circumvent its dispute with the OTS.

The Board also addressed Doolin's several other challenges to the FDIC's action. The Board rejected Doolin's contention that the FDIC should have sued in federal court to recover its unpaid assessment, rather than initiate this administrative proceeding. The Board also reasoned that the FDIC had acted reasonably in determining to rely, in part, on subjective reports of primary regulators in developing the risk-based assessment scheme. The Board further concluded that Doolin had received due process under the Administrative Procedure Act (APA), 5 U.S.C. § 551 *et seq.* Finally, the Board rejected Doolin's suggestion that the FDIC could not make an objective determination of whether to maintain Doolin's 1B classification because the FDIC is institutionally biased on its pecuniary interest in maintaining the insurance fund. Doolin filed a petition for review in this Court on July 8, 1994. By an order dated July 21, 1994, this Court stayed the FDIC Order pending review.

FDIC classification based, in part, on this OTS rating. We agree with the Board's decision that these factual concerns are not material to the FDIC's decision to terminate insurance.

[5] The Board never determined whether Doolin's "1B" classification was erroneous. *See* JA at 309 (Board decision at 5 n.5).

II.

The applicable standard under 12 U.S.C. § 1818 (h)(2) requires review "as provided in chapter 7 of Title 5 [of the APA]." Under this standard of review:

> [T]his Court, in its review of the final agency action, cannot reverse the FDIC Board action unless the findings upon which it is based are not supported by substantial evidence on the record as a whole, or unless the remedies formulated by the Board constitute an abuse of discretion or are otherwise arbitrary and capricious.

Sunshine State Bank v. FDIC, 783 F.2d 1580, 1584 (11th Cir. 1986); *see also Bullion v. FDIC*, 881 F.2d 1368, 1372-73 (5th Cir. 1989) (adopting the same standard for review under § 1818(h)(2) for civil penalty hearings regarding violations of 12 U.S.C. § 1828(j)(4)(D)).

III.

On appeal, Doolin concedes that it underpaid its assessments and thus admits to the material facts that supported the Board's conclusion that Doolin had committed a violation warranting the termination of its insured status. Doolin, however, presents numerous challenges to the Board's decision and raises several issues regarding the legality of the FDIC risk-based assessment scheme and procedural structure under which the FDIC sought to terminate Doolin's insured status. The FDIC promulgated regulations governing the risk-based assessment scheme in 1992 and 1993, and our analysis of these regulations represents a case of first impression in this Circuit. We thus proceed to address Doolin's legal arguments contesting the FDIC's risk-based assessment scheme and its accompanying procedures.

In essence, Doolin's challenges can be grouped into objections based on: (1) the reasonableness of the FDIC's

interpretation of the Federal Deposit Insurance Corporation Improvement Act of 1991 (FDICIA), Pub. L. No. 102-402, 105 Stat. 2236, in establishing the risk-based assessment scheme; (2) the constitutionality of existing FDIC procedures under which insured depository institutions challenge their assessment risk classifications; and (3) the authority of the FDIC to institute an administrative proceeding to terminate Doolin's insured status, as opposed to an action in federal district court.

A.

Doolin first challenges the lawfulness of the FDIC regulations under 12 C.F.R. § 327.3, which establish the FDIC's risk-based assessment scheme. Specifically, Doolin argues that the risk-based assessment regulations are inconsistent with the FDICIA because the regulations allow the FDIC to use subjective, bank-by-bank evaluations, such as those contained in primary regulator examination reports, in determining the assessment risk classification for depository institutions. Doolin contends that Congress intended that the FDIC create a risk-based system that would employ only objective mathematical calculations based upon the periodic financial statements filed by depository institutions.

During its first 60 years, the FDIC assessed insured institutions at the same flat rate for coverage. In 1991, however, the FDICIA established a risk-based assessment system under which the premiums paid by federally insured financial institutions are based on the risks the institutions pose to the insurance fund. Section 302(a) of the FDICIA requires the FDIC to establish final risk-based assessment regulations, and § 302(f) authorizes the FDIC to promulgate transitional regulations governing the time period between the flat-rate assessment system and the risk-based assessment system required under § 302(a). The FDIC adopted the transitional regulations

on September 15, 1992, 57 Fed. Reg. 45263 (Oct. 1, 1992), and subsequently adopted the final regulations on June 17, 1993, 58 Fed. Reg. 34357 (June 25, 1993). Both regulations were codified under 12 C.F.R. § 327. The transition regulations were in effect from January 1, 1993, to January 1, 1994, the time during which Doolin withheld portions of its assessments at issue.[6]

In § 302(a) of the FDICIA, Congress defined a "risk-based assessment system" as:

> a system for calculating a depository institution's semi-annual assessment based on—
>
> (i) the probability that the deposit insurance fund will incur a loss with respect to the institution, taking into consideration the risks attributable to—
>
> (I) different categories and concentrations of assets;
>
> (II) different categories and concentrations of liabilities, both insured and uninsured, contingent and noncontingent; and
>
> (III) any other factors the [FDIC] determines are relevant to assessing such probability;
>
> (ii) the likely amount of any such loss; and
>
> (iii) the revenue needs of the deposit insurance fund.

12 U.S.C. § 1817(b)(1)(C). Doolin emphasizes certain words in the statute, such as "risk-based," "system," and "categories," and cites certain legislative history to contend that Congress intended that the FDIC use only objective criteria in developing a risk-based assessment system. Doolin's documents offered to demonstrate "legis-

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[6] The minor differences between the transitional and the final regulations do not affect our decision regarding whether the regulations represent a reasonable interpretation of the FDICIA.

lative history," however, do not sufficiently reflect congressional intent prohibiting the FDIC from employing subjective factors in developing the system.[7] More importantly, Doolin's selective emphasis on certain words in the FDICIA cannot detract from the fact that the statute expressly gives the FDIC considerable discretion by allowing the FDIC to consider "any other factors the [FDIC] determines are relevant" in calculating an institution's semiannual assessment. *Id.*

In reviewing an agency's interpretation of a statute it administers, a court affords the interpretation "substantial deference" whenever the interpretation "provides a reasonable construction of the statutory language and is consistent with legislative intent." *Securities Indus. Ass'n v. Board of Governors of the Fed. Reserve Sys.*, 468 U.S. 207, 217 (1984). The reviewing court should inquire only into whether the agency's construction was " 'sufficiently reasonable' to be accepted by a reviewing court." *Federal Election Comm'n v. Democratic Senatorial Campaign Comm.*, 454 U.S. 27, 39 (1981). Furthermore, when a reviewing court is confronted with a silent or ambiguous statutory provision, such as the FDICIA's broad description of the risk-based assessment system, the court must defer to any reasonable interpretation of the statute by the agency designated to administer the law. *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 843 (1984); *Kennedy v. Shalala*, 995 F.2d 28, 30 (4th Cir. 1993).

In determining that the existing FDIC scheme was reasonable, the Board recognized the benefits of employing the long-established OTS primary regulatory system and of avoiding duplicative examination procedures solely

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[7] Doolin's "legislative history" suffers from several infirmities. For instance, Doolin cites a Treasury Department Report as demonstrating congressional intent, but no congressional committee adopted or incorporated the report in reporting on the FDICIA.

for the purposes of FDIC insurance assessment. The Board reasoned that such a duplicative process would be "contrary to Congressional intent in this time of reduction of regulatory paperwork and intrusion." JA at 314 (Board decision at 10).

Given the inclusive language in the FDICIA and the FDIC's policy rationale, we conclude that the FDIC reasonably interpreted the FDICIA in establishing an assessment scheme allowing the FDIC to consider subjective factors, such as the supervisory reports by primary regulators. The statute specifically grants the FDIC the authority to consider "relevant" factors, and we decline to hold unreasonable the FDIC's conclusion that the subjective supervisory reports of primary regulators are relevant to determining whether an institution would cause the insurance fund to incur a loss.[8]

B.

Doolin next argues that the procedures under the FDIC's risk-based regulations are invalid for three principal reasons.

1. FDIC termination of insurance proceedings

First, Doolin asserts that the procedures in this case failed to comply with the APA because this case was

[8] To support its argument that the FDIC may not lawfully rely on OTS examinations, Doolin cites a report from the General Accounting Office (GAO) that found that the OTS and the FDIC disagreed on the composite ratings in 9 out of the 20 thrifts the GAO examined. JA at 127 (General Accounting Office, *Thrift Examination Quality: OTS Examinations Do Not Fully Assess Thrift Safety and Soundness*, GAO/AFMD-93-11, at 36 (1993)). Although this report highlights an inconsistency between FDIC and OTS determinations, this report does not detract from the explicit congressional provision allowing the FDIC to consider any factors it deems relevant in assigning risk classifications. This Court is not a policymaking body designed to appraise the propriety of the FDIC's decision to rely on OTS reports.

decided before the ALJ on summary disposition and Doolin was not granted a formal hearing. The FDIA explicitly provides that formal APA procedures apply to cases concerning the termination of insurance. 12 U.S.C. § 1818(a)(3). Doolin's argument that the hearing requirement was not satisfied in this case mistakenly overlooks the fact that the FDIC conducted a formal adjudication under Chapter 5 of the APA, 5 U.S.C. § 554, but that this action was decided on summary disposition because no material facts regarding Doolin's assessment payments were at issue.[9] Thus, regardless of whether Doolin had a legitimate challenge to its 1B classification or whether the FDIC should have granted Doolin an evidentiary hearing in which to challenge the classification, Doolin's failure to pay its full assessment was uncontroverted and its outstanding discovery requests were properly denied as moot.[10] We thus conclude that the FDIC's procedures reviewing Doolin's termination of insurance complied with the APA.

2. *FDIC procedures to review assessment risk classifications*

More significantly, Doolin presents underlying challenges to the FDIC's procedures by which an institution seeks review of its assessment risk classification. Although this appeal directly involves the FDIC's termina-

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[9] Regarding this contention, it is important to emphasize that the procedure at issue specifically involved Doolin's termination of insurance and not the determination of its risk classification. This distinction is important because the FDIA provision requiring formal APA procedures, 12 U.S.C. § 1818(a)(3), applies to the termination of insurance and not to the determination of an institution's risk classification.

[10] We similarly reject Doolin's argument that the FDIC's procedures were unlawful because Doolin did not have an adequate opportunity for discovery. Because no issue of material fact remained, we need not address whether the FDIC's regulations improperly prohibited Doolin from conducting depositions.

tion of Doolin's insured status, these challenges remain fundamental because Doolin's termination of insurance stems directly from its beliefs regarding its risk classification. Doolin first objects to the fact that the regulations provide for no formal adjudication under the APA in which it could contest its risk classification. Under 12 C.F.R. § 327.3(g), the FDIC established an informal administrative review process through which an institution can challenge its risk classification. An institution must submit a written request for review within 30 days of the date of the letter notifying the institution of its assessment risk classification, and the institution must include documentation sufficient to support the reclassification the institution is seeking. The FDIC intended this process to be a written review procedure in which oral presentations would be permitted only at the FDIC's discretion.[11]

Doolin did, at least initially, take advantage of these informal FDIC review procedures.[12] After the FDIC noti-

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[11] At the time of the assessments at issue, § 327.3(f) of the transitional regulations included a sentence stating that "[a] request for review may include a request for an informal hearing." 12 C.F.R. § 327.3(f) (predecessor to § 327.3(g) in the final regulations), *quoted in* 57 Fed. Reg. 45263, 45285 (Oct. 1, 1992). In adopting the final regulations pursuant to § 302(a) of the FDICIA, the FDIC deleted that sentence and the word "hearing" in the last sentence of the same provision. The FDIC reasoned, that under the amendments, "the review process, which was designed predominantly as a written procedure, would remain virtually unchanged." 57 Fed. Reg. 34357, 34358-59 (June 25, 1993). The FDIC added that an institution would retain the opportunity under the amendments for an oral presentation at the FDIC's discretion. *Id.* at 34359. Given the FDIC's interpretation of the omission of the reference to a hearing, we conclude that this textual difference between the transitional and final regulations does not affect our decision regarding whether the FDIC review procedures are constitutional.

[12] Doolin petitioned the FDIC even though it had not paid its full insurance assessment. After Doolin instituted its review

fied Doolin of its 1B classification, Doolin requested review of its classification pursuant to 12 C.F.R. § 327.3. Doolin also petitioned the FDIC for an evidentiary hearing on the matter. The FDIC denied Doolin's request for a change in classification and request for a hearing by a letter dated March 25, 1993. Doolin appealed the decision to the FDIC Supervision Review Committee. By letter of July 7, 1993, the Committee also denied Doolin's requests. Doolin did not seek APA judicial review of the Committee's decision.

As the Board concluded, Doolin's argument that the APA requires formal APA hearings lacks merit because neither the FDICIA nor FDIC regulations provide for such a formal hearing. The APA creates no greater rights to a formal hearing, where, as here, the statute and regulations do not provide a hearing on the record. *See* 5 U.S.C. § 554(a) (Formal hearing requirements are limited to adjudications "required by statute to be determined on the record after opportunity for an agency hearing.").

However, although the statute and regulations do not require a formal APA hearing, Doolin may nevertheless be entitled to a predeprivation hearing under Fifth Amendment due process, and Doolin accordingly argues

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process, the FDIC amended its transitional regulations and enacted the final regulations pursuant to § 302(a) of the FDICIA. The final regulations added a provision, effective October 1, 1993, that requires institutions to make timely payment of their assessments, regardless as to whether the institution has requested review of its risk classification. 12 C.F.R. § 327.3(e)(2). We need not address the constitutionality of this requirement in the final regulations because Doolin obtained administrative review of its risk classification under the transitional regulations. We note, however, *Republic Indus., Inc. v. Teamsters Joint Council No. 83 of Virginia Pension Fund*, 718 F.2d 628, 641-42 (4th Cir. 1983) (holding that employer participating in multiemployer benefit plan would not be denied due process in having to pay withdrawal liability installment payments pending review of withdrawal liability), *cert. denied*, 467 U.S. 1259 (1984).

that these informal FDIC procedures violate its due process rights. "The fundamental requirement of due process is the opportunity to be heard 'at a meaningful time and in a meaningful manner.'" *Mathews v. Eldridge*, 424 U.S. 319, 333 (1976) (quoting *Armstrong v. Manzo*, 380 U.S. 545, 552 (1965)). "[D]ue process is flexible and calls for such procedural protections as the particular situation demands." *Id.* at 334 (quoting *Morrissey v. Brewer*, 408 U.S. 471, 481 (1972)). From these principles, the Supreme Court in *Mathews* developed a three-factor inquiry that courts use to determine what type of procedures due process requires before the government deprives an entity of property interest protected under the Due Process Clause of the Fifth or Fourteenth Amendment: [13]

> [I]dentification of the specific dictates of due process generally requires consideration of three distinct factors: First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.

Id. at 335.

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[13] Procedural due process specifically imposes constraints on governmental actions depriving individuals of a "liberty" or "property" interest. *Mathews*, 424 U.S. at 332. We proceed to address the constitutionality of the FDIC's procedures as if Doolin has a property interest in it risk classification assignment because its classification ultimately affects its deposit insurance assessment rate. However, the parties have not briefed the issue of whether institutions, as a general rule, have a protectible property interest in their risk classification assignments, and we expressly decline to make such a holding.

Applying the *Mathews* inquiry, the Fifth Circuit in *FDIC v. Bank of Coushatta,* 930 F.2d 1122 (5th Cir.), *cert. denied,* 502 U.S. 857 (1991), analyzed whether the FDIC's procedures for issuing capital directives satisfied due process. Under the procedures at issue in *Coushatta,* the FDIC notifies the financial institution of its intent to issue a capital directive and provides detailed underlying data in the notification. Upon receipt of the notification, a financial institution may file a written response with supporting data within 14 days. The procedures then require the FDIC to consider the response and issue a written determination addressing the response and establishing findings and conclusions supporting its decision to issue or not to issue a directive. *Id.* at 1130 (discussing 12 C.F.R. § 325.6).

In applying the *Mathews* test to the procedures, the Fifth Circuit concluded that the procedures satisfied due process. The court reasoned that the private interest of accurate capital directives is significant but that the risk of an erroneous deprivation is marginal. The court noted that a predeprivation hearing was not warranted because a bank has adequate opportunity to respond to the notice through the written procedures. Finally, the court found that the government's interest is substantial because delay would considerably weaken the benefits from a prompt directive, which seeks to rectify a bank's troubling undercapitalization. *Id.* at 1131.

We similarly find that the FDIC's risk classification review procedures satisfy procedural due process. Doolin's interest in its risk classification is significant because the classification affects its depository insurance assessment rate. The risk of an erroneous deprivation, however, is minimal. As with the capital directive procedures at issue in *Coushatta,* the FDIC's risk classification is based on a detailed, expert evaluation of the financial condition of an institution. The FDIC's regulations require the agency to analyze objective "capital" factors as well as

subjective "supervisory" factors.[14] The regulations provide that the FDIC will assign an institution a supervisory subgroup based on the FDIC's "consideration of supervisory evaluations provided by the institution's primary federal regulator." 12 C.F.R. § 327.3(e)(1)(ii). Furthermore, the classification review procedures are at least as sophisticated as the procedures at issue in *Coushatta*. The procedures in this case allow Doolin to submit its request and supporting documentation to the FDIC Division of Supervision. The procedures also provide for an opportunity to request an informal oral hearing, which the FDIC will grant, in its discretion, "when the Division of Supervision determines that an informal oral presentation would be productive under the applicable circumstances." 58 Fed. Reg. 34357, 34359 (June 25, 1993).[15]

Doolin does not offer sufficient evidence demonstrating that an oral hearing would allow it to present evidence to challenge its risk classification that it could not present in the written review procedure. Like the determination of social security benefits at issue in *Mathews*, 424 U.S. at 344-45, Doolin's risk classification determination did not involve credibility assessments, which would benefit from an oral hearing with the presentation of witnesses. Furthermore, Doolin's allegation of error stems from its belief that the OTS examination report

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[14] The capital factors determine the institution's "capital group," signified as a 1, 2, or 3 in the risk classification. The supervisory risk factors determine the institution's "supervisory subgroup," signified as an A, B, or C in the risk classification. 12 C.F.R. § 327.3(e)(1).

[15] As mentioned in footnote 11, *supra*, Doolin's review was governed by the transitional regulations, which explicitly allowed for requests for oral hearings. The final regulations do not contain specific language allowing such a request, but in the Federal Register notification for the final regulations, the FDIC made the statement noted in the text that an institution would retain the opportunity for an oral presentation at the FDIC's discretion. 57 Fed. Reg. 34357, 34359 (June 25, 1993).

and composite rating were erroneous. The FDIC's review procedures outlined in Enclosure II included in Doolin's notification of its assessment risk classification specifically state that review is "generally available for instances in which the institution's supervisory subgroup assignment *differs* from what would be likely considering the composite rating most recently assigned and communicated to the institution in writing by its primary federal regulator." JA at 220. We thus find no reason to conclude that more extensive review procedures within the FDIC would reduce any risk of erroneous classification.

Finally, regarding the third factor under *Mathews*, the public's interest in expeditious classification review procedures is considerable. The FDIC is charged with the difficult task of administering the SAIF, and the SAIF depends on the institutions' assessments and the interest those assessments earn to enable the FDIC to handle any crisis that might arise due to financial institution failure. The administrative burden and other societal costs associated with requiring a hearing each time an institution challenged its classification would substantially burden the FDIC. As the Supreme Court has reasoned, "At some point the benefit of an additional safeguard to the individual affected by the administrative action and to society in terms of increased assurance that the action is just, may be outweighed by the cost." *Mathews*, 424 U.S. at 348. Moreover, we note that the essence of due process is satisfied when a person is given "notice of the case against him and opportunity to meet it." *Id.* (quoting *Joint Anti-Fascist Refugee Comm. v. McGrath*, 341 U.S. 123, 171-72 (1951) (Frankfurter, J., concurring)); *see also Bowens v. North Carolina Dep't of Human Resources*, 710 F.2d 1015, 1019 (4th Cir. 1983). The FDIC procedures provided Doolin with notice of its risk classification and an opportunity to challenge the classification through the review procedures established in 12 C.F.R. § 327.3. We hold that due process does not re-

quire an institution to have predeprivation evidentiary hearing before the final assignment of an assessment risk classification.

We also find that the FDIC's procedures to review assessment risk classifications satisfy due process because Doolin could have sought APA judicial review of the decision of the FDIC Supervisory Review Committee. The FDIC Board relied on this opportunity for judicial review in its decision:

> Administrative review of FDIC assessments may be had pursuant to 12 C.F.R. § 327.3(f). Judicial review of the final agency determination then is available in the United States District Court pursuant to Chapter 7 of the Administrative Procedure Act ("APA"), 5 U.S.C. § 701 *et seq.* The Board will not allow Respondent to sidestep these procedures and raise questions about determinations of its primary regulator or the underlying insurance assessment in a section 8(a) [termination of insurance] proceeding.

JA at 310 (FDIC Board Decision at 6); *see* 5 U.S.C. § 704 ("Agency action made reviewable by statute and final agency action for which there is no other adequate remedy in a court are subject to judicial review.").

Doolin contends that seeking monetary relief from the FDIC in a district court action would cast it "into [a] jurisdictional thicket" because Doolin would confront several legal barriers, such as immunity concerns, in the action. Petitioner's Reply Br. at 7. Doolin's concerns surrounding the sufficiency of a district court action stem from its implication that it would not be able to obtain monetary damages under the due process clause for the FDIC's "constitutional or statutory violations," presumably flowing from the FDIC's assessing Doolin a faulty risk classification. *Id.* at 8.

Doolin's arguments are flawed because they assume that Doolin is entitled to monetary compensation for an incorrect risk classification assignment in addition to its regulatory remedy of a full refund of any overpayment with interest should a court hold the FDIC's classification arbitrary and the FDIC change its classification. 12 C.F.R. §§ 327.3(e)(2), 327.7(a)(2). Doolin would thus not face a "jurisdictional thicket" in pursuing a monetary claim against the FDIC or a tort claim within the discretionary exception to the Federal Tort Claims Act, 28 U.S.C. § 2680(a), because its action would simply seek judicial review of the FDIC decision upholding Doolin's risk classification. The district court would review the action pursuant to Chapter 7 of the APA, 5 U.S.C. § 706. The court would substantially defer to the FDIC's interpretation of any statute it administers but would set aside the FDIC's legal conclusions that rest on erroneous legal foundations. *See* 5 U.S.C. § 706; *FTC v. Indiana Fed'n of Dentists*, 476 U.S. 447, 454 (1986); *Chevron*, 467 U.S. at 842-844 & n.9. Additionally, because the FDIC's procedures involved informal adjudication, the district court would set aside the FDIC decision if it were "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706(2)(A); *see Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 415-16 (1971); *Aquino v. Stone*, 957 F.2d 139, 143 (4th Cir. 1992). If the court determined the rating were erroneous under this standard of review, the court would remand the case and Doolin would be entitled to a refund of any overpayment with interest. This opportunity for judicial review of FDIC reclassification determinations therefore supports our conclusion that the FDIC's risk classification review procedures satisfy due process.

In holding that the FDIC review procedures satisfy due process, we further recognize that a depository institution has adequate OTS procedural remedies through which it can directly challenge its OTS composite rating.

Under the OTS three-tier administrative review process, an institution may challenge its rating at the OTS district level and then may appeal the decision to the regional level and then to the OTS Director. Once administrative review within the OTS is exhausted, an institution may seek judicial review of the OTS action under the APA.[16]

This opportunity for OTS review is important to the constitutionality of the FDIC review procedures because throughout Doolin's appeal process, the FDIC has maintained that Doolin's risk classification was "based largely" on its OTS composite rating and that Doolin should seek direct review of its composite rating in OTS procedures. In denying Doolin's initial request for reclassification, the FDIC stated that its review procedure "was not intended to address an institution's disagreement with the supervisory evaluation provided by its primary regulator." JA at 65-66 (FDIC letter dated March 25, 1993). In denying Doolin's request on appeal, the FDIC Supervision Review Committee further reasoned that Doolin has a sufficient remedy because Doolin can request reconsideration of its FDIC classification if the OTS retroactively revises Doolin's composite rating. JA at 68 (FDIC letter dated July 7, 1993). Given this opportunity for direct administrative and judicial review of an institution's OTS composite rating, we conclude that the FDIC risk classification review procedures do not violate due process by refusing to review an institution's com-

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[16] Doolin challenged its OTS composite rating in the first two levels of the OTS review process, but it did not appeal the regional level decision to the OTS Director. In denying Doolin's request for review at the regional level, the OTS reasoned that it had not taken any action under its "Prompt Corrective Action" authority in Section 38 of the FDIA and 12 C.F.R. § 565 (mistakenly referred to as § 567 in the OTS letter) that would entitle Doolin to a hearing. JA at 207-08 (OTS letter dated March 19, 1993).

posite rating, which forms the basis for the institution's risk classification.[17]

3. Disinterested decisionmaker

Finally, Doolin argues that the FDIC procedures violate its Fifth Amendment due process rights to a disinterested decisionmaker. Specifically, Doolin argues that the FDIC has an institutional pecuniary interest in the outcome of the assessment process because 12 U.S.C. § 1817(b)(1)(C)(iii) requires the FDIC to consider the "revenue needs of the deposit insurance fund" in calculating an institution's semiannual assessments. Doolin also contends that the FDIC has an incentive to place savings institutions in more adverse risk-based deposit insurance categories than comparable bank insurance fund members because the bank insurance fund, which the FDIC administers, will be fully funded by the end of 1995, while the SAIF remains underfunded as a result of the

[17] We base our description of the OTS review process on the FDIC's representations at oral argument. At oral argument, the FDIC outlined the three-tier OTS administrative review process and maintained that "[t]he position of OTS and FDIC in this proceeding throughout has been that under OTS there is an opportunity for both administrative and judicial review in OTS proceedings." Oral argument for *Doolin Security Sav. Bank, F.S.B. v. FDIC*, No. 94-1877, Dec. 5, 1994. We assume that the FDIC correctly characterized the OTS procedures for purposes of this appeal although the FDIC pointed to no case law, statutes, regulations, or official documents that detail these procedures or the opportunity for judicial review, other than 5 U.S.C. § 702, which provides a general right of judicial review of agency action. Doolin does not dispute that the OTS has procedures to review composite ratings but argues that the OTS regulations do not delineate the existence of these procedures and that it has exhausted any such review given the OTS's refusal to provide a hearing because the OTS did not take any action under its Prompt Corrective Action authority. We hold today that the FDIC review procedures satisfy due process, but we recognize that the lawfulness of the FDIC procedures may depend on whether the OTS procedures comport with the standards of due process.

savings and loan crisis in the late 1980s. *See* Petitioner's Reply Br. at 20-21 (citing Keith Bradsher, *S. & L.'s See New Threat, This Time From Banks*, N.Y. Times, Oct. 20, 1994, at C2). As the party making the assertion of bias, Doolin bears the burden of establishing that the FDIC has a disqualifying interest. *Schweiker v. McClure*, 456 U.S. 188, 196 (1982).

The Supreme Court has jealously protected the due process requirement of impartiality when the decision-makers stood to gain substantial, personal pecuniary benefits from their adjudicative decisions. *See, e.g., Tumey v. Ohio*, 273 U.S. 510, 523, 532-34 (1927) (reversing convictions imposed by mayor in mayor's court when mayor's fees and costs directly depended on fines imposed from convictions and when village financially benefitted from fines); *Connally v. Georgia*, 429 U.S. 245, 250-51 (1977) (invalidating system in which justices of the peace were paid for issuance but not for nonissuance of search warrants); *Aetna Life Ins. Co. v. Lavoie*, 475 U.S. 813, 820-25 (1986) (holding state supreme court justice disqualified under due process clause when justice had pending an action for damages he had filed on the same issue in another court). The Court has further reasoned that personal pecuniary interests may disqualify an adjudicator in an administrative setting as well as a judicial setting. *Gibson v. Berryhill*, 411 U.S. 564, 578-79 (1973) (reasoning that members of Board of Optometry were disqualified because they personally benefitted from reduced competition through license revocations).

The Supreme Court has held that institutional pecuniary interests rendered the adjudicator unconstitutionally biased only in *Ward v. Village of Monroeville*, 409 U.S. 57 (1972). In *Ward*, the Mayor of Monroeville was also the presiding judge of the mayor's court, which heard cases of ordinance violations and certain traffic offenses. On grounds of separation of powers, the Court invalidated the procedure by which fines, forfeitures, costs, and fees

produced from the mayor's court accounted for a substantial portion of city revenues. Although the mayor's salary was not dependent on these sums, the Court held that the mayor was unconstitutionally biased because his "executive responsibilities for village finances may make him partisan to maintain the high level of contribution from the mayor's court." *Id.* at 59-62; *see also Meyer v. Niles Township,* 477 F. Supp. 357, 362 (N.D. Ill. 1979) (holding that township supervisory cannot impartially adjudicate claims for benefits and supervise funds out of which benefits are paid). *But see Dugan v. Ohio,* 277 U.S. 61, 65 (1928) (rejecting simliar due process challenge to conviction obtained in mayor's court because mayor had very limited executive authority). The Court based its conclusion on the test in *Tumey* that the mayor's situation was one "which would offer a possible temptation to the average man as a judge to forget the burden of proof required to convict the defendant, or which might lead him not to hold the balance nice, clear, and true between the state and the accused." *Ward,* 409 U.S. at 60 (quoting *Tumey,* 273 U.S. at 532).

Doolin's claim of institutional bias is significantly different from interest addressed in *Ward* and is more akin to the claim in *Hammond v. Baldwin,* 866 F.2d 172 (6th Cir. 1989). The claimants in *Hammond* alleged that the state administrative process was biased in issuing wastewater treatment permits because the state had contracted with a private corporation to "use its best efforts" to expedite the review of permits as part of the state's incentive program to entice the corporation to locate in the state. *Id.* at 174. In *Hammond,* the Sixth Circuit distinguished *Ward* and *Gibson* to conclude that an entire state government would not be disqualified from decisionmaking on the grounds of bias when claimants alleged general institutional bias in favor of a state interest or policy. *Id.* at 177. In its reasoning, the court also distinguished *United Church of the Medical Center v. Medical Center Commission,* 689 F.2d 693, 699-700

(7th Cir. 1982), in which the Seventh Circuit found the state's Medical Center Commission was biased because the Commission gained a direct pecuniary benefit from decisions against property owners. *Hammond*, 866 F.2d at 177. Specifically, the court in *United Church* reasoned that the Commisison was biased in adjudicating proceedings in which the Commission determined whether property was to revert to itself, without cost to the Commission even if the property had valuable improvements, and in which the Commission obtained the proceeds from any subsequent sale of the property. *United Church*, 689 F.2d at 699-700.

Following the reasoning in *Hammond*, we hold that finding the FDIC biased in this case would seriously undermine the ability of agencies in general to adjudicate disputes that affect their official policies. Unlike the claimants in the Supreme Court cases above, Doolin does not isolate certain decisionmakers and indicate reasons why those particular adjudicators are biased. Doolin rather alleges that the entire decisionmaking apparatus of the FDIC is biased because Congress has required the FDIC to consider the needs of the insurance fund in determining assessments. This general allegation implies an institutional bias much less influential than the institutional "temptation" in *Ward*, in which the mayor's executive function substantially benefitted from fines he imposed in his adjudicative function. *See Ward*, 409 U.S. at 59-60. Moreover, unlike the unrestricted pecuniary interest of the medical commission in *United Church*, the FDIC's interest in providing for the fund is circumscribed under 12 U.S.C. § 1817(b)(2)(A)(iv).[18] This statutory limitation is important to adjudging institutional bias as this

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[18] Under 12 U.S.C. § 1817(b)(2)(A)(iv), Congress designated the reserve ratio of each deposit insurance fund to be 1.25% of total estimated insured deposits or a "higher percentage" if the FDIC Board determines that circumstances "raise[] a significant risk of substantial future losses to the fund."

Court has reasoned that statutory restrictions placed on adminisrative adjudicators support a finding that a dispute resolution mechanism is not institutionally biased. *See Republic Indus., Inc. v. Teamsters Joint Council No. 83 of Virginia Pension Fund,* 718 F.2d 628, 640-41 (4th Cir. 1983) (reasoning that trustees were not biased in making determinations of withdrawal liability, in part, because their computation of liability was prescribed by the Multiemployer Pension Plan Amendments Act of 1980, 29 U.S.C. § 1381 *et seq.*), *cert. denied,* 467 U.S. 1259 (1984).

The FDIC's interest in maintaining the fund appears no greater than the interests of many agencies that adjudicate penalty or fee determinations in their own administrative proceedings. Presumably all agencies inherently have some level of "institutional bias," but such an interest does not render all agencies incapable of adjudicating disputes within their own proceedings given the strong public interest in effective, efficient, and expert decisionmaking in the administrative setting. Thus, we decline to abrogate the presumption of honesty and integrity of administrators, *see Schweiker,* 456 U.S. at 195; *Withrow v. Larkin,* 421 U.S. 35, 47 (1975); and we agree with the Board's decision that the FDIC procedures do not violate Doolin's due process right to a disinterested decisionmaker.

C.

Doolin next challenges the FDIC's authority to commence an administrative proceeding to terminate the insurance of an institution that has withheld portions of its insurance assessments. Doolin first argues that the FDIC lacked subject matter jurisdiction to resolve the dispute and collect the withheld assessments. Specifically, Doolin claims that an action to collect money from an insured financial institution is akin to an action to collect a debt that should be resolved by an Article III court pursuant to section 7(g) of FDIA, 12 U.S.C. § 1817(g), and that

the savings institution would have the right to a jury trial in the court proceeding. The Board concluded that the termination of insurance proceeding was an appropriate recourse because it would not be "fiscally prudent" for the FDIC to commence protracted litigation each time an institution refused to pay an assessment.[19] JA at 312 (Board decision at 7-8).

An administrative agency is entitled to considerable deference in selecting the remedies to enforce the policy of a statute it administers. *See Butz v. Glover Livestock Comm'n Co.*, 411 U.S. 182, 185-86 (1973); *American Power & Light Co. v. SEC*, 329 U.S. 90, 112 (1946). We thus may not overturn an agency's choice of remedy unless we find it "unwarranted in law or . . . without justification in fact." *American Power*, 329 U.S. at 112-13. Importantly, while 12 U.S.C. § 1817(g) provides the FDIC with the authority to commence an action in "any court of competent jurisdiction" against a financial institution that fails to pay all or part of its insurance premium assessments, this remedy is not exclusive. Under 12 U.S.C. § 1818(a)(2)(A), the FDIC is also authorized to commence an administrative hearing to terminate the insurance of an insured institution that has "violated any applicable law, regulation, order, [or] condition imposed in writing" by the FDIC.[20] Nothing in § 1817(g) limits

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[19] Given the Board's justification, we reject Doolin's argument that the Board's decision was arbitrary and capricious because it failed to provide any rationale for the FDIC's decision to terminate Doolin's insurance rather than exercise its collection remedy under § 1817(g). Furthermore, the FDIC's choice of a remedy remains discretionary, and it is not controlling that the FDIC did initiate a district court action to collect unpaid assessments in a case twelve years ago, *FDIC v. European American Bank & Trust Co.*, 576 F. Supp. 950 (S.D.N.Y. 1983).

[20] Doolin argues that its withholding of money was not a "violation" under the FDIA for which the termination of insurance is justified under § 1818(a). Because this Court accords substantial deference to an agency's interpretation of a statute it administers,

this authority under § 1818(a). Furthermore, as the Board noted, "the language of section 1817(h) [of Title 12] is clear on its face that the remedies of section 1817(g) are *in addition to* any other remedy against an insured depository institution available to the FDIC (emphasis added." JA at 313 (Board decision at 9). Section 1817(h) provides:

> The remedies provided in this subsection and in subsections (f) and (g) of this section shall not be construed as limiting any other remedies against any insured depository institution, but shall be in addition thereto.

12 U.S.C. § 1817(h).

The Board has previously stated that "[t]he purpose of a termination [of insurance] proceedings is to limit the risk an insured institution poses to the insurance fund." *In re First State Bank of Marlin*, FDIC Enforcement Decisions and Orders ¶ 8013, at I-50 (1992). Doolin's self-help decision to withhold portions of its assessments poses such a danger to the insurance fund. The fund would be at risk if the FDIC were obliged to commence a district court action each time an institution followed Doolin's actions and unilaterally withheld the portions of its assessments it considered erroneous. As noted, the fund depends on the institutions' assessments and the interest those assessments earn to enable the FDIC to tackle any crisis that might arise due to financial institution failure. Withholding disputed assessments is not the only alternative for institutions such as Doolin. As concluded above, depository institutions have adequate opportunity to challenge their classifications through FDIC administrative procedures and judicial review of

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see Securities Indus. Ass'n v. Board of Governors of the Fed. Reserve Sys., 468 U.S. 207, 217 (1984), we decline to find erroneous the Board's conclusion that Doolin's withholding the amount in dispute constituted a "violation" under § 1818(a).

FDIC decisions. Thus, given the inclusive language in the statute and the policy reasons supporting the FDIC's decision that it would not be "fiscally prudent" to commence a district court action, we conclude that the FDIC has the authority to instigate a termination of insurance proceeding when an institution violates applicable law and withholds portions of its insurance assessments.[21]

Doolin argues, in the alternative, that even if the FDIC had the power to terminate Doolin's deposit insurance, the Board's decision was arbitrary and capricious and failed to satisfy 5 U.S.C. § 557(c)(3) because it did not address all of Doolin's factual and legal arguments.[22] Regarding Doolin's factual exceptions, the critical factual issues in this case involving Doolin's nonpayment of portions of its insurance assessment were undisputed. Consequently, neither the ALJ nor the Board need have discussed Doolin's exceptions, which primarily concerned the 1992 OTS examination and Doolin's risk classification assignment. *See* JA at 309 (Board Decision at 5 n.5) (noting that Doolin's factual exceptions were not relevant). Regarding Doolin's legal exceptions, the Board's 15-page decision provided a reasoned discussion of the legal arguments the Board considered material. The Board's failure to address every argument in detail does not render its decision arbitrary. We therefore hold

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[21] We reject Doolin's argument that the FDIC's termination of insurance action is akin to an action to collect a debt. As the Board reasoned, the FDIC's motivation for commencing this action, to encourage Doolin to pay its full assessment, does not alter the nature of this action. This action is to terminate Doolin's insured status, and the FDIC seeks no money in this action. Furthermore, because we conclude that the FDIC need not have initiated a district court action, we need not address whether Doolin has a right to a jury trial in such an action.

[22] Under 5 U.S.C. § 557(c)(3), all agency decisions required to be on the record "shall include a statement of—(A) findings and conclusions, and the reasons or basis therefor, on all the material issues of fact, law, or discretion presented on the record."

that the FDIC decision was not arbitrary and capricious and did not violate 5 U.S.C. § 557(c)(3).[23]

IV.

For the foregoing reasons, we affirm the decision of the FDIC Board of Directors to terminate Doolin's federal deposit insurance.

AFFIRMED

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[23] We also note that the Board's decision is supported by substantial evidence, the appropriate standard of review for formal adjudication. *See* 5 U.S.C. § 706(2)(E); *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 414 (1971).

APPENDIX B

[Filed June 13, 1995]

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 94-1877
93-178-A

DOOLIN SECURITY SAVINGS BANK, F.S.B.,
Petitioner

v.

FEDERAL DEPOSIT INSURANCE CORPORATION,
Respondent

ON PETITION FOR REHEARING WITH
SUGGESTION FOR REHEARING IN BANC

Petitioner's petition for rehearing and suggestion for rehearing in banc were submitted to this Court. As no member of this Court or the panel requested a poll on the suggestion for rehearing in banc, and

As the panel considered the petition for rehearing and is of the opinion that it should be denied,

IT IS ORDERED that the petition for rehearing and suggestion for rehearing in banc are denied.

For the Court,

/s/ Bert M. Montague
Clerk

APPENDIX C

FEDERAL DEPOSIT INSURANCE CORPORATION
WASHINGTON, D.C.

FDIC-93-178a

IN THE MATTER OF

DOOLIN SECURITY SAVINGS BANK, FSB
NEW MARTINSVILLE, WEST VIRGINIA

(INSURED FEDERAL SAVINGS ASSOCIATION)

DECISION AND ORDER TO TERMINATE INSURED STATUS

INTRODUCTION

The Federal Deposit Insurance Corporation ("FDIC") commenced this administrative proceeding on or about November 18, 1993, to terminate the status of Doolin Security Savings Bank, FSB, New Martinsville, West Virginia ("Respondent" or "Doolin") as an insured federal savings association pursuant to section 8(a) of the Federal Deposit Insurance Act ("Act"), 12 U.S.C. § 1818 (a)(2)(B); for failure to pay its 1993 semi-annual assessments to the Savings Association Insurance Fund.[1] The matter is before the Board of Directors of the FDIC ("Board") following the submission of the Recommended

[1] The Savings Association Insurance Fund and the Bank Insurance Fund are collectively referred to herein as the Insurance Funds.

Decision[2] of Administrative Law Judge Arthur L. Shipe ("ALJ"), which recommends that the Motion for Summary Disposition of FDIC Enforcement Counsel be granted.

The Board concurs in and adopts the Findings of Fact and Conclusions of Law set forth by the ALJ in his Recommended Decision and makes further findings and conclusions as set forth below.

BACKGROUND

A summary of the facts of this case, which are further detailed in the ALJ's Findings of Fact (R. D. at 3-6), is as follows. The FDIC established a risk-based insurance system and created regulations for implementing such system, pursuant to legislative mandate. 12 U.S.C. § 1817(a). In accordance with its regulations, the FDIC issued to Respondent a Risk-Related Deposit Insurance Assessment Rate Notification ("Notification") dated December 1, 1992, assigning Respondent risk classification "1B" for purposes of determining the annual depost insurance assessment rate for the six-month period beginning January 1, 1993. The insurance assessment called for by the Notification was $40,651.53. Respondent self-determined that its risk classification should have been "1A" rather than "1B," which would have reduced its insurance assessment to $32,677.37. It made this determination because Respondent takes the position that the rating assigned by its primary regulator, the Office of Thrift Supervision ("OTS"), in its 1992 Examination Report, was erroneous. Because the 1992 OTS Examination Report is one of the factors used by FDIC in assign-

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[2] Citations to the record shall be as follows:

Recommended Decision	"R. D. at ——."
Respondent's Exceptions	"Resp. Ex. at ——."
Respondent's Brief in Opposition to Motion for Summary Disposition	"Resp Br. at ——."

ing the risk classification[3], Respondent asserts that the FDIC's assignment of risk classification "1B" is also erroneous. Respondent paid to the FDIC $32,677.37 and withheld the difference of $7,974.16. Answer at ¶ 12. The process was repeated with the subsequent semi-annual payment. Respondent paid to the FDIC the amount of $59,728.68 due on the basis of a "1A" classification, rather than $67,519.24 which was the amount due on the basis of its "1B" classification. Answer at ¶ 14. Respondent withheld a total of $15,764.80 of its deposit insurance assessment. *Id.*

Based on Respondent's failure to comply with the statute and regulations governing the deposit insurance system requiring payment of the full amount assessed, the FDIC issued its Notice of Intention to Terminate Insured Status, Findings, and Order Setting Hearing on November 18, 1993. Respondent filed a timely Answer asserting numerous affirmative defenses and a demand for a jury trial.

Prior to the commencement of this action, OTS brought an enforcement proceeding ("OTS Proceeding") against Respondent in which most of the issues raised by Respondent in this proceeding are raised.[4] According to Respondent, its dispute with OTS arises out of an OTS

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[3] Section 327.3(d)(1)(ii) of the FDIC's assessment regulation provides that ". . . each institution will be assigned to one of the three subgroups on the basis of supervisory evaluations by the institution's primary federal supervisor and, if applicable, state supervisor; and such other information as the Corporation determines to be relevant to the institution's financial condition and the risk posed to the BIF or SAIF." 12 C.F.R. § 327.3(d)(1)(ii).

[4] In the Matter of Doolin Security Savings Bank, FSB, New Martinsville, West Virginia, OTS No. AP 93-74. Doolin's Second Defense in the instant case is identical to a defense raised in the OTS Proceeding asserting OTS misconduct and violation of the Paperwork Reduction Act. Both allegations were successfully stricken by OTS in its proceeding.

investigation of Doolin and ComServ, a firm with which it conducted business. Resp. Br. at 4-7. Its dispute focuses on the OTS' treatment of loan and lease loss provisions and allegations of violation of the loans-to-one-borrower rule contained in the 1992 Examination Report of Doolin. None of these issues involves the FDIC.

The Board finds that section 8(a) of the Act, 12 U.S.C. § 1818(a), authorizes the FDIC to terminate the deposit insurance of an insured depository institution which violates applicable law, regulation or order. Respondent is required by statute and regulation to pay insurance fees in accordance with its assessment notice. 12 U.S.C. § 1817(c)(2); 12 C.F.R. § 327.3. Respondent admits that it has not done so, Answer ¶¶ 12, 14, and thus admits that it has violated both applicable law and regulation. Therefore, the FDIC's action to terminate Respondent's insurance is clearly authorized and appropriate.

Summary judgment may be granted "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c). With respect to FDIC Enforcement Counsel's Motion for Summary Disposition in this proceeding under section 8(a), the ALJ correctly found that there are no material issues of fact and that this matter may be decided as a matter of law.[5] R. D. at 11. Summary Disposition in favor of the FDIC is appropriate.

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[5] Respondent contests many factual issues primarily related to the 1992 examination conducted by OTS, as well as the risk classification assignment made by FDIC to the extent it is based on the OTS examination report. See, Resp. Br. at 4-17. None of these issues is relevant to this proceeding under section 8(a). Respondent has admitted all facts material to a determination under section 8(a). Review of the OTS classification of Respondent's loans may be had pursuant to OTS' established procedures.

DISCUSSION

Though not part of the determination that the FDIC has met its burden under section 8(a) and that termination of Respondent's deposit insurance is appropriate, the nature of Respondent's pleadings convinces the Board to address certain of the issues Respondent raises.

The proper issue in this proceeding under section 8(a) is whether Respondent has paid its insurance premium in accordance with law and regulation, and, if it has not, the FDIC's authority to terminate its deposit insurance.

Contrary to Respondent's repeated assertions and attempts to make it so, this is *not*

> ". . . a test not only of the FDIC's assessments of Doolin, but also of the FDIC's authority to create a subjective risk-based deposit insurance assessment scheme, of the non-APA procedures the FDIC established to implement its scheme, and of the FDIC's determination to enforce its assessments against Doolin in an administrative proceeding rather than an Article III court." Resp. Br. at 1; Resp. Ex. at 17.

Respondent is free, of course, to raise its constitutional challenge to the risk based assessment system in an appropriate proceeding.[6] Administrative review of FDIC as-

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[6] It is abundantly clear from the record that Respondent's real grievance is against OTS. See Resp. Br. at 4-6, 8-10. However, if Respondent wishes to challenge determinations made by OTS, it must follow the appropriate OTS procedures for such challenge. Respondent has in fact availed itself of that opportunity. Respondent and OTS have been engaged in a protracted dispute which gave rise to an investigation of Doolin and eventually to litigation over the OTS' 1992 Examination Report of Respondent, which, in part, served as the basis for the FDIC's assessment classification. To date, Respondent has been unsuccessful in obtaining a modification of the Examination Report from OTS. Its challenges here are a blatant effort to "back door" its litigation with OTS. Neither the termination of insurance proceeding under

sessments may be had pursuant to 12 C.F.R. § 327.3(f). Judicial review of the final agency determination then is available in the United States District Court pursuant to chapter 7 of the Administrative Procedure Act ("APA"), 5 U.S.C. § 701 *et seq.* The Board will not allow Respondent to sidestep these procedures and raise questions about determinations of its primary regulator or the underlying insurance assessment in a section 8(a) proceeding.

Instead of following established procedures, Respondent takes the position that the FDIC should sue in federal court to force payment of the full assessment. Respondent ignores the responsibility of the FDIC to the Insurance Funds. As a matter of sound policy aimed at protecting the Insurance Funds, in promulgating its regulations the FDIC determined that the solvency of the funds could not be placed at risk by depository institutions disputing their assessments.[7] Unless depository institutions

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section 8(a) nor the insurance assessment proceeding was intended to enable a financial institution to "end run" its primary regulator with which it disagrees. Significantly, throughout these proceedings Respondent has been on notice that if the full assessment is paid, and the OTS subsequently modifies its findings, the FDIC will reconsider its insurance risk classification and if the classification were changed to "1A," the difference in assessment would be paid to Respondent *with interest*. See, 12 C.F.R. § 327.7(a)(2); 57 Fed. Reg. 45284 (Oct. 1, 1992).

[7] The Notification received by all depository institutions recognizes that institutions may be dissatisfied with the underlying examination report by their primary regulator, which might lead to dissatisfaction with the assessment category. The Notification at Enclosure II states:

> The request for review procedure is generally available for instances in which the institution's supervisory subgroup assignment differs from what would be likely considering the composite rating most recently assigned and communicated to the institution in writing by its primary federal regulator. It is not intended as a means for an institution to dispute the composite rating assigned to the institution by its primary federal regulator under the Uniform Financial Institutions

are required to pay their assessments in full and *then* dispute an assessment with which they disagree, the Insurance Funds would be jeopardized—directly contrary to the intent of Congress in creating risk-based insurance. The FDIC must anticipate with reasonable certainty the amount of the semi-annual additions to the funds. Were institutions free to withhold payment and force the FDIC to sue each such institution to recover every semi-annual assessment withheld, the FDIC could not operate the funds in a fiscally prudent manner. This is precisely the problem raised by the approach espoused by the Respondent.

Such a risk was not placed on the Insurance Funds by Congress and cannot be placed upon it by Respondent. In balancing the need to protect the Insurance Funds against the interest of an individual institution in challenging its assessment, the balance must be struck to protect the funds. See, *Commissioner v. Phillips,* 283 U.S. 589 (1931). Adequate protection has been provided to depository institutions which comply with the regulations and then challenge their assessment.

Respondent asserts that the FDIC is required by 12 U.S.C. § 1817(g) to bring an action in district court to seek unpaid insurance assessments.[8] The ALJ correctly

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Rating System. Each primary federal regulator has established procedures for that purpose.

Accordingly, the regulations provide for the return or credit of overpayment with interest should the depository institution and primary regulator resolve their differences to the benefit of the institution. 12 C.F.R. § 327.7(a)(2). If Respondent is satisfied [sic] with the result of the administrative review by the FDIC, it may seek review of that result in district court under the APA.

[8] In a related argument Respondent asserts that because the FDIC has stated that the intention behind bringing this action to terminate its insurance is to obtain payment of the full insurance assessment, this is actually an action to collect a debt which can be maintained only in an Article III court. Resp. Br. at 19. Respondent is incorrect, of course. The motivation for bringing an action—

concludes that section 1817(g) contains no such requirement. R. D. at 10. That section provides the FDIC's authority to commence an action in district court against a financial institution which fails to pay all or part of its insurance premium. However, the FDIC is under no obligation to do so. The remedy of section 1817(g) is not exclusive and does not limit in any way the FDIC's ability to select an alternative method of redress, such as the use of its authority to terminate the insurance of an insured depository instituiton which fails or refuses to pay its assessment. Indeed, the language of section 1817(h) is clear on its face that the remedies of section 1817(g) are *in addition to* any other remedy against an insured depository institution available to the FDIC (emphasis added). The choice of remedy lies with the FDIC and it has acted within the scope of its permissible discretion here in choosing to terminate Respondent's insurance.

Respondent asserts that the insurance assessment procedure established by the FDIC is in excess of the FDIC's statutory authority (Answer, Third Defense) and in excess of the "statutory jurisdiction, authority, or limitations of the FDIC, or short of statutory right" (Answer, Seventh Defense). These assertions are groundless with no basis in the statute or its legislative history. Section 302 of the Federal Deposit Insurance Corporation Improvement Act of 1991 ("FDICIA"), Pub. L. No. 102-242, 105 Stat. 2236, 2345, mandates the establishment of a risk-based insurance assessment system for insured depository institutions and section 302(a) of FDICIA requires the FDIC to adopt regulations establishing such a system. Section 302(f) of FDICIA authorized the FDIC to adopt regulations governing the transition between the

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here, to encourage Respondent's compliance with statute and regulation—does not convert the nature of the action. The FDIC seeks no money in this proceeding under section 8(a) and is not seeking to collect a debt. An administrative proceeding is appropriate and permitted by statute under the facts presented by this proceeding. 12 U.S.C. § 1818(a)(3).

then-existing assessment system and the risk-based assessment mandated by section 302(a) of FDICIA. The statute provides great latitude to the FDIC. Respondent cites to a Treasury Department report, purportedly as evidence of legislative intent that a program different from the existing one be established. But the Treasury Report does not provide such evidence and, in any event, would not show Congressional intent unless it had been adopted or incorporated by the committees reporting on FDICIA, which it was not.

The FDIC was required to establish a risk-based insurance assessment program that is *reasonable*. This it has done.[9] In determining to rely, in part, on the examination reports of primary regulators, the FDIC acted reasonably in light of the statutory time frame and the long-established bank regulatory system. That system would have been ill-served had the FDIC opted to create a second, duplicative, and perhaps conflicting examination solely for purposes of insurance assessment. Had it created such a system, the FDIC then would have been acting contrary to Congressional intent in this time of reduction of regulatory paperwork and intrusion. Moreover, in proposing and refining the current assessment scheme through notice and comment rulemaking, the FDIC carefully considered comments from all quarters, the vast majority of which favored the proposal of the FDIC which relied on

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[9] The standard for review of such agency action was established by the Supreme Court in *Federal Election Commission v. Democratic Senatorial Campaign Commission*, 454 U.S. 27, 39, 102 S.St. 38, 46 (1981). The Court found that the role of a reviewing court

> "was not to interpret the statute as it thought best but rather the narrower inquiry into whether the Commission's construction was 'sufficiently reasonable' to be accepted by a reviewing Court . . . . To satisfy this standard it is not necessary for a court to find that the agency's construction was the only reasonable one or even the reading the court would have reached if the question initially had arisen in a judicial proceeding."

a combination of objective and subjective factors—financial data provided by the institutions and supervisory examination reports provided by the primary regulators—in determining risk classification. *See,* 57 Fed. Reg. 45280 (Oct. 1, 1992). Such consideration is entitled to judicial deference. *FDIC v. European American Bank & Trust Co.,* 576 F. Supp. 950, 954 (S.D.N.Y. 1983).

Respondent next makes two somewhat confused complaints about not having received a formal APA hearing (Answer, Fourth and Fifth Defense). First, proceedings under section 8(a) of the Act *are* on the record adjudications under 5 U.S.C. § 554, and Respondent has been actively participating in such a formal APA hearing.[10] In fact, this decision is the culmination of that proceeding. The Board is at a loss to find a basis for Respondent's complaint.

Respondent also appears to object to the fact that no formal APA proceeding was provided in which it could contest its assessment category. This complaint is without merit. No such hearing is required by statute or regulation. However, the FDIC's regulations do provide for an opportunity for an insured institution to present its position in an informal administrative proceeding. The process was intended to be a "paper" hearing with oral presentations to be permitted only at the discretion of the FDIC.[11] Doolin availed itself of the procedure provided

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[10] Because section 8(a) provides for an administrative hearing, Respondent is not entitled to a judicial trial, and per force, the ALJ correctly found that Respondent is not entitled to a jury trial. R. D. at 10.

[11] At the time of the assessments at issue, the review procedure involved a first level of review by the appropriate Regional Director and a second level by the Director of the Division of Supervision. Subsequently, the regulations were amended to provide for the first level of review at headquarters, rather than in the region, and to clarify the informality of the hearing. 58 Fed. Reg. 84357 (June 25, 1993).

and first requested and was granted review of its classification. When no change in the classification was made, Doolin sought subsequent review by the Supervisory Review Committee, which again upheld the classification. In each instance Doolin was free to submit any material it believed to be helpful. The APA creates no greater rights where, as here, an on the record hearing is not required by statute or regulation.[12]

Respondent further argues that because the Insurance Funds benefit (*i.e.*, collect more money) from maintaining Respondent's classification at "1B," the FDIC cannot make a fair determination of the issue. However, the statute authorizing the FDIC risk-based insurance system specifically recognized the interests of the Insurance Funds and identifies the needs of the funds as a factor in determining classification. 12 U.S.C. § 1817(b). Moreover, this statute is not unique. Previously this Board has stated:

> "mere assertion of a conflict of interest clearly inherent in the statutory scheme established by Congress is insufficient to overcome the presumption of the propriety of agency action and Congressional recognition of the interest of the FDIC . . . ." *In the Matter of First City, Texas-Austin, National Association, Austin, Texas,* FDIC-92-316kk, 1 P-H FDIC Enf. Dec. ¶ 5209 (1993), citing *Landy v. Federal Deposit Insurance Corp.*, 486 F.2d 139 (3rd Cir. 1973); *FCC v. Schreiber,* 381 U.S. 279, 296 (1965); *Fahey v. Mallonee,* 332 U.S. 245, 256 (1947).

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[12] Contrary to Respondent's argument, the APA does not provide a formal hearing for all grievances. In fact, such hearings are limited to only those "adjudications *required by statute* to be determined *on the record* after opportunity for hearing." (Emphasis added.) 5 U.S.C. § 554.

OTHER ISSUES

Respondent filed a 55 page document captioned "Exceptions to the Recommended Decision." In fact, this document is almost entirely a duplication of Respondent's Brief in Opposition to FDIC's Motion for Summary Disposition. At pages 15-17 Respondent "excepts" to the Recommended Decision insofar as it does not adopt Respondent's proposed findings of fact or conclusions of law. For the reasons set forth in this Decision and Order, the Board rejects all of Respondent's so-called exceptions.

By letter dated January 28, 1994, Respondent's president, Donald R. Stout, wrote to the Board indicating Respondent's willingness "to post bond with the United States District Court for the Northern District of West Virginia in a sum equal to the amount of dispute" in this proceeding. There was not at the time, and is not now, any proceeding before the U.S. District Court, so it could not accept such a bond. Moreover, such a bond is no substitute for a timely and proper assessment payment.

CONCLUSION

In conclusion, while the FDIC is loathe to terminate the deposit insurance of an otherwise viable institution, the deposit insurance system cannot be held hostage to disagreement over an examination report between an institution and its primary regulator. Where the insurance assessment scheme established by statute and regulation assures depository institutions that overpayment will be refunded or credited to future payment, and interest paid should they be erroneously assessed, 12 U.S.C. § 1817(e), the outcome of this proceeding is the result of the Respondent's inappropriate resort to self-help. Such resort to self-help cannot be condoned or tolerated where a Respondent has other options which provide it with full due process and of which it failed to avail itself.

Thus, the Board denies Respondent's request for a stay pending judicial review. Under the Board's Order, Re-

spondent's insured status will terminate sixty (60) days after reecipt of the Order by Respondent. Notice of the impending termination, however, must be given to Doolin's depositors thirty (30) days after receipt of the Order. The Board will maintain jurisdiction over this matter during the sixty-day period. This will provide an opportunity for Respondent to avoid termination of its insurance and for the Board to reconsider its Order should Respondent meet the following conditions: (1) Respondent shall pay the full amount of all delinquent insurance assessment payments to date, plus interest, as required by 12 C.F.R. § 327.7,[13] and (2) Respondent shall enter into a written affirmative agreement to pay the full amount of all future insurance assessments, subject to any review or reassignment of risk classification pursuant to the procedures set forth in Part 327 of the FDIC's Rules and Regulations after full payment is made. Violation of any such written agreement may subject Doolin's board of directors to the assessment of civil money penalties.

ORDER TO TERMINATE INSURED STATUS

For the reasons set forth above, IT IS ORDERED, FIRST, that the insured status of the Doolin Security Savings Bank, FSB, New Martinsville, West Virginia ("Insured Institution") be, and the same hereby is, terminated effective as of the close of business sixty (60) days from the date of receipt by Respondent of this ORDER.

IT IS FURTHER ORDERED, SECOND, that, on or before the close of business thirty (30) days from the date of receipt of this ORDER, the Insured Institution shall give notice to its depositors of the termination of its status as an insured institution ("Depositor Notification"). The Depositor Notification shall be mailed to each depositor and shall be published in two local newspapers in

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[13] Respondent did not pay the full amount of its assessment which was due and payable no later than January 31, 1994.

accordance with the requirements of section 308.123 of the FDIC's Rules of Practice and Procedure, 12 C.F.R. § 308.123. The Insured Institution shall furnish the FDIC with a copy of the Depositor Notification mailed and an affidavit executed by the person who mailed the same. Further, the Depositor Notification shall satisfy the requirements of section 308.123 of the FDIC's Rules of Practice and Procedure, 12 C.F.R. § 308.123, by stating as follows:

NOTICE

(Date) ————————

1. The status of Doolin Security Savings Bank, FSB, New Martinsville, West Virginia as an insured depository institution, under the provisions of the Federal Deposit Insurance Act, will terminate as of the close of business on the —— day of ————, 1994.

2. Any deposits made by you after that date, whether the same be new deposits or additions to existing deposits, will not be insured by the Federal Deposit Insurance Corporation.

3. Insured deposits in Doolin Security Savings Bank, FSB, New Martinsville, West Virginia, on the — day of ————, 1994, will continue to be insured, as provided by the Federal Deposit Insurance Act, for two (2) years after the close of business on the — day of ———, 1994. Provided, however, that any withdrawals after the close of business on the — day of ———, 1994, will reduce the insurance coverage by the amount of such withdrawals.

Doolin Security Savings Bank, FSB
250 Main Street
New Martinsville, West Virginia

With prior written approval of the FDIC, the Insured Institution may include in the Depositor Notification any

additional information or advice it may desire to give its depositors, provided that such additional information is not inconsistent with this paragraph.

THIRD, that, if the Insured Institution refuses or fails to give such notice as specified in paragraph SECOND of this ORDER, the FDIC is authorized to notify the Insured Institution's depositors by:

(a) Sending notice of the termination of the insured status of the Insured Institution to each of the Insured Institution's depositors at his or her last address of record as shown on the books of the Insured Institution; and/or

(b) Publishing notice of the termination of the Insured Institution's insured status by use of a detailed statement of the facts of this matter in one or more local papers of general circulation in Wetzel County, West Virginia; and/or

(c) Posting a copy of such notice in the lobby of the Insured Institution, local post office, and/or any other appropriate place of equal prominence; and/or

(d) Seeking any judicial order as it may deem proper or necessary to require the Insured Institution to comply with the provisions herein.

FOURTH, that, if the Insured Institution is closed for liquidation prior to the effective termination date, as fixed in paragraph FIRST, the notices prescribed herein shall not be given to depositors.

FIFTH, that, after the date of termination of the Insured Institution's insured status, the Insured Institution shall not advertise or hold itself out as having insured deposits, unless, in the same connection, it shall also state, with equal prominence, that such additions to deposits and new deposits made after the date of termination of insured status are not insured. Further, the Insured Institution shall not use any of its checks, letterheads, pro-

motional materials, signs, and the like which bear the words "Member of FDIC" or any like statements relating to membership in or supervision by the FDIC.

SIXTH, that the insured deposits of the Insured Institution on the date of termination shall continue to be insured by the FDIC according to the provision of section 8(a) of the Act, 12 U.S.C. § 1818(a). Furthermore, the Insured Institution shall continue to file statements and pay assessments thereon for the period the deposits are insured pursuant to the provision of section 7 of the Act, 12 U.S.C. § 1817, and shall, in all other respects, be subject to the duties and obligations of an insured depository institution pursuant to section 8(a)(7) of the Act, 12 U.S.C. § 1818(a)(7).

EIGHTH, that the Board of Directors of the FDIC retains full jurisdiction over these proceedings during the interim between the date hereof and the effective termination date, as fixed in paragraph FIRST, with full power and authority to amend, modify, alter or rescind this ORDER.

By direction of the Board of Directors.

Dated at Washington, D.C., this 29th day of June, 1994.

/s/ Robert E. Feldman
ROBERT E. FELDMAN
Acting Executive Secretary

[SEAL]

APPENDIX D

FEDERAL DEPOSIT INSURANCE CORPORATION
WASHINGTON, D.C.

FDIC-93-178a

IN THE MATTER OF

DOOLIN SECURITY SAVINGS BANK, F.S.B.
NEW MARTINSVILLE, WEST VIRGINIA

(INSURED FEDERAL SAVINGS ASSOCIATION)

RECOMMENDED ORDER ON SUMMARY DISPOSITION

ARTHUR L. SHIPE, Administrative Law Judge

This proceeding was instituted by a "Notice of Intention to Terminate Insured Status, Findings, and Order Setting Hearing", issued pursuant to 12 U.S.C. § 1818 (a)(2)(B) on November 18, 1993. The Notice alleges that Respondent has violated 12 U.S.C. § 1817, and 12 C.F.R. § 327, and that because of these violations it is not entitled to continue operations as an insured depository institution within the meaning of 12 U.S.C. § 1818 (a). Specifically, the Notice alleges that Respondent has failed to pay its federal deposit insurance fees as assessed, but instead remitted lower amounts for the six-month periods beginning January 1, 1993 and July 1, 1993.

Respondent submitted an Answer variously denying and admitting the allegations of the Notice. Nine defenses and a demand for a jury trial were included in the Answer.

On January 21, 1994, FDIC Enforcement filed a motion for summary disposition pursuant to 12 C.F.R.

§ 308.29. That section provides that the Administrative Law Judge shall issue a final order granting such motions where there exists "no genuine issue as to any material fact," and, "the moving party is entitled to a decision in its favor as a matter of law."

FDIC Enforcement alleges that the following material facts are not in dispute in this proceeding.

1. Doolin Security Savings Bank, F.S.B., New Martinsville, West Virginia ("Doolin") is an "insured depository institution" as that term is defined in the Federal Deposit Insurance Act ("Act"), 12 U.S.C. § 1913(c)(2), is a federally chartered savings association doing business under the laws of the United States, and has its principal place of business in New Martinsville, West Virginia. It pays its deposit insurance assessments to the FDIC under Section 7 of the Act, 12 U.S.C. § 1817, which assessments are credited to the Savings Association Insurance Fund ("SAIF"). The FDIC has jurisdiction over Doolin. Admitted in Paragraph No. 2 of ANSWER OF RESPONDENT DOOLIN SECURITY SAVINGS BANK, F.S.B., dated the 24th day of November, 1993 (hereinafter "Answer").

2. Each insured depository institution is required by section 7(c)(1) of the Act, 12 U.S.C. § 1817(c)(1) to file a certified statement with the FDIC showing its average assessment base. Admitted in Paragraph No. 4 of Answer.

3. Section 302 of the Federal Deposit Insurance Corporation Improvement Act of 1991 ("FDICIA"), Pub. L. No. 102-242, 105 Stat. 2236, 2345, provides for the establishment of a risk-based insurance assessment system for insured depository institutions. Admitted in Paragraph No. 5 of Answer.

4. Section 302(a) of FDICIA, Pub. L. No. 102-242, 105 Stat. 2236, 2345, requires the FDIC to adopt regulations establishing a risk-based assessment system. Sec-

tion 302(f) of FDICIA, Pub. L. No. 201-242, 105 Stat. 2236, 2349, authorizes the FDIC to adopt regulations governing the transition between the then-existing assessment system and the risk-based assessment system mandated by Section 302(a). A transitional system was adopted by the FDIC on September 15, 1992, 57 Fed. Reg. 45263 (Oct. 1, 1992), and subsequently amended, both codified in Part 327 of the Regulations, 12 C.F.R. Part 327. Admitted in Paragraph No. 6 of Answer.

5. Section 327.3 of the FDIC Regulations, 12 C.F.R. § 327.3, requires an insured depository institution to pay to the FDIC the amount of the assessment shown on the certified statement, as does Section 7(c)(1) of the Act, 12 U.S.C. § 1817(c)(1) (1989). Admitted in Paragraph No. 7 of Answer.

6. The FDIC notified Doolin, by letter dated December 1, 1992, that it was assigned for the purposes of determining its annual deposit insurance assessment rate a risk classification of 1B, which carried a rate of $0.26 for each $100 of domestic deposits. Admitted in Paragraph No. 9 of Answer.

7. The semiannual assessment for the six months beginning January 1, 1993, was due and payable on or before January 13, 1993. Admitted in Paragraph No. 10 of Answer.

8. In January, 1993, Doolin submitted to the FDIC the original certified statement, on which the FDIC had indicated an annual assessment of $0.26 for each $100 of domestic deposits, the rate for an institution assigned, as was Doolin, a 1B assessment risk classification; and an altered version of the certified statement on which Doolin had substituted an annual assessment rate of $0.23 for each $100 of domestic deposits, the rate corresponding to the 1A rating. Admitted in Paragraph No. 11 of Answer.

9. By substituting the rate for an insured depository institution with an assessment risk classification of 1A,

Doolin caused the calculation of its semiannual assessment to show an assessment amount of $32,677.37, which it then paid, in lieu of the $40,651.53 as called for in the original certified statement provided to Doolin by the FDIC, a difference of $7,974.16. Admitted in Paragraph No. 12 of Answer.

10. On discovery of the underpayment, the FDIC notified Doolin on May 18, 1993, and again on July 14, 1993, that it had failed to pay its full semiannual assessment that was due and payable by January 31, 1993. Admitted in Paragraph No. 13 of Answer.

11. The next semiannual payment was due and payable by July 31, 1993. Doolin, in July of 1993, again submitted to the FDIC the original certified statement, on which the FDIC had indicated an annual rate of $0.26 for each $100 of domestic deposits, the rate for an institution assigned, as was Doolin, a 1B assessment risk classification, and an altered version of the certified statement, on which Doolin had substituted an annual assessment rate of $0.23 per $100 of domestic deposits, the rate corresponding to the 1A rating. Admitted in Paragraph 14 of Answer.

12. By substituting the rate for an insured depository institution with a assessment risk classification of 1A, Doolin caused the calculation of its semiannual assessment to show an assessment amount of $59,728.68, which it then paid, in lieu of the $67,519.24 as called for in the original certified statement provided to Doolin by the FDIC, a difference of $7,790.68. Thus, Doolin, for 1993, has underpaid its deposit insurance assessment by a total of $15,764.80. Admitted in Paragraph 14 of Answer.

The Respondent filed an extensive reply to the FDIC motion, but it has not attempted to refute the factual claims upon which the motion is based. The alleged facts as set forth above are, accordingly, deemed established as true.

As those assertions of fact indicate, the instant dispute arises from Respondent's assessment by the FDIC of federal deposit insurance fees based on an assigned risk classification of "1B". It claims that the proper classification for it was "1A". The assigned classification results in an insurance assessment which is three cents per $100 of deposits higher than the 1A classification. Respondent has paid a premium reflective of a 1A classification.

Respondent seeeks to challenge here the lawfulness of the classification rating assigned to it, including the adequacy of the procedure by which that rating was determined.

Respondent was given notice by the FDIC of its risk classification category in December 1992. Respondent thereupon requested review of that classification pursuant to 12 C.F.R. § 327.3(f), then effective, which allowed review upon written request to the FDIC's Director of the Division of Supervision. Respondent also requested a hearing on the matter.

The request for a change in classification, as well as that for a hearing, was denied by letter of March 25, 1993. That letter also informed Respondent that it could request further review of the matter by the FDIC Supervision Review Committee. Such a review was requested and the relief sought was denied by letter of July 7, 1993.

A related petition by Respondent for the FDIC to establish procedures by rulemaking requiring an evidentiary hearing on the assignment of risk classifications has also been denied by the FDIC's Board of Directors.

The issue presented here is whether the determination by FDIC officials of Respondent's risk classification assignment, and the lawfulness of the procedures by which that classification was determined, are reviewable in this proceeding. It is my conclusion that no such review is permissible here.

The denial of Respondent's requests for a change in its classification, and for an evidentiary hearing, stated that the appropriate recourse for an institution to contest its risk classification assignment is through the procedures established for that purpose by the institution's primary regulator. Respondent's primary regulator, the Office of Thrift Supervision, has refused to alter the findings from which the contested classification is derived.

It is clear that the FDIC Board does not contemplate litigation of this issue in proceedings conducted pursuant to the Administrative Procedure Act. Therefore, the determination by the FDIC of the appropriate risk classification for Respondent, in accordance with procedures deemed by it to be adequate, is binding here. Any appeal of those previous determinations by the FDIC, or the OTS, lies with the courts, not with this forum.

As stated, the Notice instituting this proceeding alleges that the failure of Respondent to remit the assessed insurance premiums is a violation of law. The FDIC, under 12 U.S.C. § 1818(a), may terminate the deposit insurance of an insured depository institution for, *inter alia,* violations of applicable law, regulation, or order.

It is claimed here that Respondent's failure to remit insurance fees in accordance with its assessment violates 12 U.S.C. § 1817(c)(1) and 12 C.F.R. § 327.3.

Section 1817(c)(1) provides:

> (1) On or before the last day of the first month following each semiannual period, each insured depository institution which became insured prior to the beginning of such period shall file with the Corporation a certified statement showing its average assessment base for such period, and the amount of the semiannual assessment due to the Corporation for the semiannual period which begins with such month. Each such depository institution shall pay to

the Corporation the amount of the semiannual assessment it is required to certify.

Section 327.3 provides:

> (a) Required—(1) In general. Except as provided in paragraph (a)(2) of this section, each insured depository institution shall pay the amount of the semiannual assessment due for the current semiannual period, as shown on its certified statement for such period.
>
> (2) Newly insured institutions. A newly insured institution shall not be required to pay an assessment for the semiannual period during which it becomes an insured institution.

It is concluded that Respondent has not paid "to the Corporation the amount of the semiannual assessment it is required to certify" based upon its average assessment base and applicable rate, and that Respondent is therefore in violation of the cited statutory provision and regulation.

Respondent contends that 12 U.S.C. § 1817(g) precludes the instant action. That section allows the FDIC to bring a court suit to recover any unpaid assessment lawfully made. There is nothing, however, in that provision which abrogates the termination of insurance authority granted to of the FDIC by Section 1818(a). Moreover, section 1817(h) provides to the contrary. It states, "The remedies provided in this subsection and subsections (f) and (*g*) (emphasis supplied) of this section shall not be construed as limiting any other remedies against any insured depository institution, but shall be in addition thereto." Plainly, the authority of the FDIC to terminate insurance is not qualified by Section 1817(g).

As a related defense, Respondent argues that under the Seventh Amendment it is entitled to a jury trial in this matter because it concerns a "legal" dispute over the collection of money. However, it is well settled that

there is no constitutional right to a jury trial in administrative proceedings. *See* e.g., *Atlas Roofing Co. v. Occupational Safety and Health Review Commission,* 430 U.S. 442 (1977).

Respondent makes the further constitutional argument that the FDIC cannot determine the issue in controversy consistent with due process because of its alleged interest in the outcome. However, the statutory scheme under which the FDIC functions requires that procedure. While it may be too broad a statement to assert that an administrative agency cannot determine constitutional issues, it is settled that an agency cannot find its statutory authority unconstitutional. See *Weinberger v. Salfi* 422 U.S. 749, 765 (1975); *Finnerty v. Cowen,* 508 F.2d 979, 981 (2d. Cir. 1974).

For the reasons stated, it is my conclusion that there are no *material* facts in genuine issue, that the FDIC is entitled to a decision in its favor as a matter of law, and that the following order should be entered.[1]

So Ordered, this 24th day of February, 1994.

/s/ Arthur L. Shipe
ARTHUR L. SHIPE
Administrative Law Judge
Date: February 24, 1994

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[1] Consistent with the instant ruling, all pending discovery motions are hereby denied as moot.

FEDERAL DEPOSIT INSURANCE CORPORATION
WASHINGTON, D.C.

FDIC-93-178a

IN THE MATTER OF

DOOLIN SECURITY SAVINGS BANK, F.S.B.
NEW MARTINSVILLE, WEST VIRGINIA

(INSURED FEDERAL SAVINGS ASSOCIATION)

ORDER TERMINATING INSURED STATUS

IT IS ORDERED, FIRST, that the insured status of the Doolin Security Savings Bank F.S.B., New Martinsville, West Virginia ("Insured Institution") be, and the same hereby is, terminated effective as of the earlier of March 31, 1994 or the close of business forty-five (45) days from the day of the Final Decision issued by the Board of Directors of the Federal Deposit Insurance Corporation ("FDIC") in enforcement proceeding FDIC-93-178a).

IT IS FURTHER ORDERED, SECOND, that, before the earlier of March 31, 1994 or the close of business thirty (30) days from the date of the Final Decision of the FDIC's Board of Directors, the Insured Institution shall give notice to its depositors of the termination of its status as an insured institution (the "Depositor Notification"). The Depositor Notification shall be mailed to each depositor at the depositor's last address of record, as shown upon the Insured Institution's books. The Insured Institution shall furnish the FDIC with a copy of the Depositor Notification mailed and an affidavit executed by the person who mailed the same. The Depositor Notification shall satisfy the requirements of Section

308.123 of the FDIC's Rules of Practice and Procedure, 12 C.F.R. § 308.123, by stating as follows:

NOTICE

(Date) ————————

1. The status of Doolin Security Savings Bank F.S.B., New Martinsville, West Virginia as an insured depository institution, under the provisions of the Federal Deposit Insurance Act, will terminate as of the close of business on the —— day of ————, 1994.

2. Any deposit made by you after that date, whether the same be new deposits or additions to existing deposits, will not be insured by the Federal Deposit Insurance Corporation.

3. Insured deposits in Doolin Security Savings Bank F.S.B., New Martinsville, West Virginia, on the —— day of ————, 1994 will continue to be insured, as provided by the Federal Deposit Insurance Act, for two (2) years after the close of business on the —— day of ————, 1994. Provided, however, that any withdrawals after the close of business on the —— day of ————, 1994 will reduce the insurance coverage by the amount of such withdrawals.

Doolin Security Savings Bank F.S.B.
250 Main Street
New Martinsville, West Virginia

With prior written approval of the FDIC the Insured Institution may include in the Depositor Notification any additional information or advice it may desire to give its depositors, provided that such additional information is not inconsistent with this paragraph.

THIRD, that before the earlier of ———— 1994, or the close of business thirty (30) days from the date of the Final Decision of the FDIC's Board of Directors, the Insured Institution shall publish the Depositor Noti-

fication in not less than two issues of a local newspaper of general circulation in Wetzel County West Virginia and shall furnish the FDIC with proof of such publication in the form of a certification from the publisher and a tear sheet or clipping evidencing such publication.

FOURTH, that, if the Insured Institution refuses or fails to give such notice as specified in paragraphs SECOND and THIRD of this ORDER TERMINATING INSURED STATUS ("ORDER"), the FDIC is authorized to notify the Insured Institution's depositors by:

(a) Sending notice of the termination of the insured status of the Insured Institution to each of the Insured Institution's depositors at his or her last address of record as shown on the books of the Insured Institution; and/or

(b) Publishing notice of the termination of the Insured Institution's insured status by use of a detailed statement of the facts of this matter in one or more local papers of general circulation in Wetzel County, West Virginia; and/or

(c) Posting a copy of such notice in the lobby of the Insured Institution, local post office, and/or any other appropriate place of equal prominence; and/or

(d) Seeking any judicial order as it may deem proper or necessary to require the Insured Institution to comply with the provisions herein.

FIFTH, that, if the Insured Institution is closed for liquidation prior to the effective termination date, as fixed in paragraph FIRST, the notices prescribed in paragraphs SECOND, THIRD, and FOURTH shall not be given to depositors.

SIXTH, that, after the date of termination of the Insured Institution's insured status, the Insured Institution shall not advertise or hold itself out as having insured deposits, unless, in the same connection, it shall also state

with equal prominence, that such additions to deposits and new deposits made after the date of termination of insured status are not insured. Further, the Insured Institution shall not use any of its checks, letterheads, promotional materials, signs, and the like which bear the words "Member of FDIC" or any like statements relating to membership in or supervision by the FDIC.

SEVENTH, that the insured deposits of the Insured Institution on the date of termination shall continue to be insured by the FDIC according to the provisions of Section 8(a) of the Act, 12 U.S.C. § 1818(a). Furthermore, the Insured Institution shall continue to file statements and pay assessments thereon for the period the deposits are insured pursuant to the provision of Section 7 of the Act, 12 U.S.C. § 1817, and shall, in all other respects, be subject to the duties and obligations of an insured depository institution pursuant to Section 8(a)(7) of the Act, 12 U.S.C. § 1818(a)(7).

EIGHTH, that the Executive Secretary, or his designee, shall send copies of this ORDER to the Insured Institution and the Primary Regulator, the Office of Thrift Supervision.

NINTH, that this ORDER is fully enforceable by the FDIC pursuant to the provisions of Section 8(i) of the Act, 12 U.S.C. § 1818(i).

TENTH, that the Board of Directors of the FDIC retains full jurisdiction over these proceedings during the interim between the date hereof and the effective termination date, as fixed in paragraph FIRST, with full power and authority to amend, modify, alter or rescind this ORDER.

By direction of the Board of Directors.

Dated at Washington, D.C. this —— day of ————, 1994.

ROBERT F. FELDMAN
Executive Secretary

APPENDIX E

CONSTITUTIONAL PROVISIONS, STATUTES AND REGULATIONS INVOLVED

CONSTITUTIONAL PROVISIONS

U.S. Const. art. III, § 2, cl. 1 provides:

The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority;—to all Cases affecting Ambassadors, other public Ministers and Consuls;—to all Cases of admiralty and maritime Jurisdiction;—to Controversies to which the United States shall be a Party;—to Controversies between two or more States;—between a State and Citizens of another State;—between Citizens of different States,—between Citizens of the same State claiming Lands under Grants of different States, and between a State, or the Citizens thereof, and foreign States, Citizens or Subjects.

U.S. Const. amend. V provides in pertinent part:

No person shall . . . be deprived of life, liberty, or property, without due process of law; . . . .

U.S. Const. am. VII provides:

In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law.

PORTIONS OF THE ADMINISTRATIVE PROCEDURE ACT

5 U.S.C. § 554 provides:

(a) This section applies, according to the provisions thereof, in every case of adjudication required by statute to be determined on the record after opportunity for an agency hearing, except to the extent that there is involved—

(1) a matter subject to a subsequent trial of the law and the facts de novo in a court;

(2) the selection or tenure of an employee, except a[4] administrative law judge appointed under section 3105 of this title;

(3) proceedings in which decisions rest solely on inspections, tests, or elections;

(4) the conduct of military or foreign affairs functions;

(5) cases in which an agency is acting as an agent for a court; or

(6) the certification of worker representatives.

(b) Persons entitled to notice of an agency hearing shall be timely informed of—

(1) the time, place, and nature of the hearings;

(2) the legal authority and jurisdiction under which the hearing is to be held; and

(3) the matters of fact and law asserted.

When private persons are the moving parties, other parties to the proceeding shall give prompt notice of issues controverted in fact or law; and in other instances agencies may by rule require responsive pleading. In fixing the time and place for hearings, due regard shall be

[4] So in original.

had for the convenience and necessity of the parties or their representatives.

(c) The agency shall give all interested parties opportunity for—

(1) the submission and consideration of facts, arguments, offers of settlement, or proposals of adjustment when time, the nature of the proceeding, and the public interest permit; and

(2) to the extent that the parties are unable so to determine a controversy by consent, hearing and decision on notice and in accordance with sections 556 and 557 of this title.

(d) The employee who presides at the reception of evidence pursuant to section 556 of this title shall make the recommended decision or initial decision required by section 557 of this title, unless he becomes unavailable to the agency. Except to the extent required for the disposition of ex parte matters as authorized by law, such an employee may not—

(1) consult a person or party on a fact in issue, unless on notice and opportunity for all parties to participate; or

(2) be responsible to or subject to the supervision or direction of an employee or agent engaged in the performance of investigative or prosecuting functions for an agency.

An employee or agent engaged in the performance of investigative or prosecuting functions for an agency in a case may not, in that or a factually related case, participate or advise in the decision, recommended decision, or agency review pursuant to section 557 of this title, except as witness or counsel in public proceedings. This subsection does not apply—

(A) in determining applications for initial licenses;

(B) to proceedings involving the validity or application of rates, facilities, or practices of public utilities or carriers; or

(C) to the agency or a member or members of the body comprising the agency.

(e) The agency, with like effect as in the case of other orders, and in its sound discretion, may issue a declaratory order to terminate a controversy or remove uncertainty.

5 U.S.C. § 556 provides:

§ 556. Hearings; presiding employees; powers and duties; burden of proof; evidence; record as basis of decision

(a) This section applies, according to the provisions thereof, to hearings required by section 553 or 554 of this title to be conducted in accordance with this section.

(b) There shall preside at the taking of evidence—

(1) the agency;

(2) one or more members of the body which comprises the agency; or

(3) one or more administrative law judges appointed under section 3105 of this title.

This subchapter does not supersede the conduct of specified classes of proceedings, in whole or in part, by or before boards or other employees specially provided for by or designated under statute. The functions of presiding employees and of employees participating in decisions in accordance with section 557 of this title shall be conducted in an impartial manner. A presiding or participating employee may at any time disqualify himself. On the filing in good faith of a timely and sufficient affidavit of personal bias or other disqualification of a presiding or participating employee, the agency shall determine the matter as a part of the record and decision in the case.

(c) Subject to published rules of the agency and within its powers, employees presiding at hearings may—

(1) administer oaths and affirmations;

(2) issue subpoenas authorized by law;

(3) rule on offers of proof and receive relevant evidence;

(4) take depositions or have depositions taken when the ends of justice would be served;

(5) regulate the course of the hearing;

(6) hold conferences for the settlement or simplification of the issues by consent of the parties or by the use of alternative means of dispute resolution as provided in subchapter IV of this chapter;

(7) inform the parties as to the availability of one or more alternative means of dispute resolution, and encourage use of such methods;

(8) require the attendance at any conference held pursuant to paragraph (6) of at least one representative of each party who has authority to negotiate concerning resolution of issues in controversy;

(9) dispose of procedural requests or similar matters;

(10) make or recommend decisions in accordance with section 557 of this title; and

(11) take other action authorized by agency rule consistent with this subchapter.

(d) Except as otherwise provided by statute, the proponent of a rule or order has the burden of proof. Any oral or documentary evidence may be received, but the agency as a matter of policy shall provide for the exclusion of irrelevant, immaterial, or unduly repetitious evidence. A sanction may not be imposed or rule or order issued except on consideration of the whole record or those parts thereof cited by a party and supported by and in accordance with the reliable, probative, and substantial evidence. The agency may, to the extent consistent with the interests of justice and the policy of the

underlying statutes administered by the agency, consider a violation of section 557(d) of this title sufficient grounds for a decision adverse to a party who has knowingly committed such violation or knowingly caused such violation to occur. A party is entitled to present his case or defense by oral or documentary evidence, to submit rebuttal evidence, and to conduct such cross-examination as may be required for a full and true disclosure of the facts. In rule making or determining claims for money or benefits or applications for initial licenses an agency may, when a party will not be prejudiced thereby, adopt procedures for the submission of all or part of the evidence in written form.

(e) The transcript of testimony and exhibits, together with all papers and requests filed in the proceeding, constitutes the exclusive record for decision in accordance with section 557 of this title and, on payment of lawfully prescribed costs, shall be made available to the parties. When an agency decision rests on official notice of a material fact not appearing in the evidence in the record, a party is entitled, on timely request, to an opportunity to show the contrary.

5 U.S.C. § 557 provides:

§ 557. Initial decisions; conclusiveness; review by agency; submissions by parties; contents of decisions; record

(a) This section applies, according to the provisions thereof, when a hearing is required to be conducted in accordance with section 556 of this title.

(b) When the agency did not preside at the reception of the evidence, the presiding employee or, in cases not subject to section 554(d) of this title, an employee qualified to preside at hearings pursuant to section 556 of this title, shall initially decide the case unless the agency requires, either in specific cases or by general rule, the entire record to be certified to it for decision. When the

presiding employee makes an initial decision, that decision then becomes the decision of the agency without further proceedings unless there is an appeal to, or review on motion of, the agency within time provided by rule. On appeal from or review of the initial decision, the agency has all the powers which it would have in making the initial decision except as it may limit the issues on notice or by rule. When the agency makes the decision without having presided at the reception of the evidence, the presiding employee or an employee qualified to preside at hearings pursuant to section 556 of this title shall first recommend a decision, except that in rule making or determining applications for initial licenses—

(1) instead thereof the agency may issue a tentative decision or one of its responsible employees may recommend a decision; or

(2) this procedure may be omitted in a case in which the agency finds on the record that due and timely execution of its functions imperatively and unavoidably so requires.

(c) Before a recommended, initial, or tentative decision, or a decision on agency review of the decision of subordinate employees, the parties are entitled to a reasonable opportunity to submit for the consideration of the employees participating in the decisions—

(1) proposed findings and conclusions; or

(2) exceptions to the decisions or recommended decisions of subordinate employees or to tentative agency decisions; and

(3) supporting reasons for the exceptions or proposed findings or conclusions.

The record shall show the ruling on each finding, conclusion, or exception presented. All decisions, including initial, recommended, and tentative decisions, are a part of the record and shall include a statement of—

(A) findings and conclusions, and the reasons or basis therefor, on all the material issues of fact, law, or discretion presented on the record; and

(B) the appropriate rule, order, sanction, relief, or denial thereof.

(d)(1) In any agency proceeding which is subject to subsection (a) of this section, except to the extent required for the disposition of ex parte matters as authorized by law—

(A) no interested person outside the agency shall make or knowingly cause to be made to any member of the body comprising the agency, administrative law judge, or other employee who is or may reasonably be expected to be involved in the decisional process of the proceeding, an ex parte communication relevant to the merits of the proceeding;

(B) no member of the body comprising the agency, administrative law judge, or other employee who is or may reasonably be expected to be involved in the decisional process of the proceeding, shall make or knowingly cause to be made to any interested person outside the agency an ex parte communication relevant to the merits of the proceeding;

(C) a member of the body comprising the agency, administrative law judge, or other employee who is or may reasonably be expected to be involved in the decisional process of such proceeding who receives, or who makes or knowingly causes to be made, a communication prohibited by this subsection shall place on the public record of the proceeding:

(i) all such written communications;

(ii) memoranda stating the substance of all such oral communications; and

(iii) all written responses, and memoranda stating the substance of all oral responses, to the

materials described in clauses (i) and (ii) of this subparagraph;

(D) upon receipt of a communication knowingly made or knowingly caused to be made by a party in violation of this subsection, the agency, administrative law judge, or other employee presiding at the hearing may, to the extent consistent with the interests of justice and the policy of the underlying statutes, require the party to show cause why his claim or interest in the proceeding should not be dismissed, denied, disregarded, or otherwise adversely affected on account of such violation; and

(E) the prohibitions of this subsection shall apply beginning at such time as the agency may designate, but in no case shall they begin to apply later than the time at which a proceeding is noticed for hearing unless the person responsible for the communication has knowledge that it will be noticed, in which case the prohibitions shall apply beginning at the time of his acquisition of such knowledge.

(2) This subsection does not constitute authority to withhold information from Congress.

5 U.S.C. § 558 provides:

§ 558. Imposition of sanctions; determination of applications for licenses; suspension, revocation, and expiration of licenses

(a) This section applies, according to the provisions thereof, to the exercise of a power or authority.

(b) A sanction may not be imposed or a substantive rule or order issued except within jurisdiction delegated to the agency and as authorized by law.

(c) When application is made for a license required by law, the agency, with due regard for the rights and

privileges of all the interested parties or adversely affected persons and within a reasonable time, shall set and complete proceedings required to be conducted in accordance with sections 556 and 557 of this title or other proceedings required by law and shall make its decision. Except in cases of willfulness or those in which public health, interest, or safety requires otherwise, the withdrawal, suspension, revocation, or annulment of a license is lawful only if, before the institution of agency proceedings therefor, the licensee has been given—

(1) notice by the agency in writing of the facts or conduct which may warrant the action; and

(2) opportunity to demonstrate or achieve compliance with all lawful requirements.

When the licensee has made timely and sufficient application for a renewal or a new license in accordance with agency rules, a license with reference to an activity of a continuing nature does not expire until the application has been finally determined by the agency.

5 U.S.C. § 559 provides in pertinent part:

Subsequent statute may not be held to supersede or modify this subchapter, chapter 7, sections 1305, 3105, 3344, 4301(2)(E), 5372, or 7521 of this title, or the provisions of section 5335(a)(B) of this title that relate to administrative law judges, except to the extent that it does so expressly.

5 U.S.C. § 706 provides:

To the extent necessary to decision and when presented, the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of an agency action. The reviewing court shall—

(1) compel agency action unlawfully withheld or unreasonably delayed; and

(2) hold unlawful and set aside agency action, findings, and conclusions found to be—

(A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;

(B) contrary to constitutional right, power, privilege, or immunity;

(C) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right;

(D) without observance of procedure required by law;

(E) unsupported by substantial evidence in a case subject to sections 556 and 557 of this title or otherwise reviewed on the record of an agency hearing provided by statute; or

(F) unwarranted by the facts to the extent that the facts are subject to trial de novo by the reviewing court.

In making the foregoing determinations, the court shall review the whole record or those parts of it cited by a party, and due account shall be taken of the rule of prejudicial error.

PORTIONS OF THE FEDERAL DEPOSIT INSURANCE ACT

12 U.S.C. § 1813(v) provides:

VIOLATION.—The term "violation" includes any action (alone or with another or others) for or toward causing, bringing about, participating in, counseling, or aiding or abetting a violation.

12 U.S.C. § 1817(b) provides:

(1) Risk-based assessment system

(A) Risk-based assessment system required

The Board of Directors shall, by regulation, establish a risk-based assessment system for insured depository institutions.

(B) Private reinsurance authorized

In carrying out this paragraph, the Corporation may—

(i) obtain private reinsurance covering not more than 10 percent of any loss the Corporation incurs with respect to an insured depository institution; and

(ii) base that institution's semiannual assessment (in whole or in part) on the cost of the reinsurance.

(C) "Risk-based assessment system" defined

For purposes of this paragraph, the term "risk-based assessment system" means a system for calculating a depository intsitution's semiannual assessment based on—

(i) the probability that the deposit insurance fund will incur a loss with respect to the in-

stitution, taking into conisderation the risks attributable to—

(I) different categories and concentrations of assets;

(II) different categories and concentrations of liabilities, both insured and uninsured, contingent and noncontingent; and

(III) any other factors the Corporation determines are relevant to assessing such probability;

(ii) the likely amount of any such loss; and

(iii) the revenue needs of the deposit insurance fund.

(D) Separate assessment systems

The Board of Directors may establish separate risk-based assessment systems for large and small members of each deposit insurance fund.

(2) Setting assessments

(A) Achieving and maintaining designated reserve ratio

(i) In general

The Board of Directors shall set semiannual assessments for insured depository institutions—

(I) to maintain the reserve ratio of each deposit insurance fund at the designated reserve ratio; or

(II) if the reserve ratio is less than the designated reserve ratio, to increase the reserve ratio to the designated reserve ratio as provided in paragraph (3).

(ii) Factors to be considered

In carrying out clause (i), the Board of Directors shall consider the deposit insurance fund's—

(I) expected operating expenses,

(II) case resolution expenditures and income,

(III) the effect of assessments on members' earnings and capital, and

(IV) any other factors that the Board of Directors may deem appropriate.

(iii) Minimum assessment

The semiannual assessment for each member of a deposit insurance fund shall be not less than $1,000.

(iv) Designated reserve ratio defined

The designated reserve ratio of each deposit insurance fund for each year shall be—

(I) 1.25 percent of estimated insured deposits; or

(II) a higher percentage of estimated insured deposits that the Board of Directors determines to be justified for that year by circumstances raising a significant risk of substantial future losses to the fund.

(B) Independent treatment of funds

The Board of Directors shall—

(i) set semiannual assessments for members of each deposit insurance fund independently from semiannual assessments for members of any other deposit insurance fund; and

(ii) set the designated reserve ratio of each deposit insurance fund independently from the designated reserve ratio of any other deposit insurance fund.

(C) Notice of assessments

The Corporation shall notify each insured depository institution of that institution's semiannual assessement.

(D) Priority of Financing Corporation and Funding Corporation assessments

Notwithstanding any other provision of this paragraph, amounts assessed by the Financing Corporation under section 1441 of this title against Savings Association Insurance Fund members shall be subtracted from the amounts authorized to be assessed by the Corporation under this paragraph.

(E) Minimum assessments

The Corporation shall design the risk-based assessment system for any deposit insurance fund so that, if the Corporation has borrowings outstanding under section 1824 of this title on behalf of that fund or the reserve ratio of that fund remains below the designated reserve ratio, the total amount raised by semiannual assessments on members of that fund shall be not less than the total amount that would have been raised if—

(i) this subsection as in effect on July 15, 1991 remained in effect; and

(ii) the assessment rate in effect on July 15, 1991 remained in effect.

(F) Transition rule for Savings Association Insurance Fund

With respect to the Savings Association Insurance Fund, during the period beginning on the effective date of the amendments made by section 302(a) of the Federal Deposit Insurance Corporation Improvement Act of 1991 and ending on December 31, 1997—

(i) subparagraph (A)(i)(II) shall apply as if such subparagraph did not include "as provided in paragraph (3)"; and

(ii) subparagraph (E) shall be applied by substituting "if this subsection as in effect on July 15, 1991 remained in effect." for "if—" and all that follows through clause (ii).

(G) Special rule until the insurance funds achieve the designated reserve ratio

Until a deposit insurance fund achieves the designated reserve ratio; the Corporation may limit the maximum assessment on insured depository institutions under the risk-based assessment system authorized under paragraph (1) to not less than 10 basis points above the average assessment on insured depository institutions under that system.

(H) Bank Enterprise Act requirement

The Corporation shall design the risk-based assessment system so that, insofar as the system bases assessment, directly or indirectly, on deposits, the portion of the deposits of any insured depository institution which are attributable to lifeline accounts established in accordance with the Bank Enterprise Act of 1991 shall be subject to assessment at a rate determined in accordance with such Act.

(3) Special rule for capitalizing undercapitalized funds

(A) In general

Except as provided in paragraph (2)(F), if the reserve ratio of any deposit insurance fund is less than the designated reserve ratio under paragraph (2)(A)(iv), the Board of Directors shall set semiannual assessment rates for members of that fund—

(i) that are sufficient to increase the reserve ratio for that fund to the designated reserve ratio not later than 1 year after such rates are set; or

(ii) in accordance with a schedule promulgated by the Corporation under subparagraph (B).

(B) Recapitalization schedules

For purposes of subparagraph (A)(ii), the Corporation shall by regulation promulgate a schedule that specifies, at semiannual intervals, target reserve ratios for that fund, culminating in a reserve ratio that is equal to the designated reserve ratio not later than 15 years after the date on which the schedule is implemented.

(C) Amending schedule

The Corporation may, by regulation, amend a schedule promulgated under subparagraph (B) and such amendment may extend the date specified in subpragraph (B) to such later date as the Corporation determines will, over time, maximize the amount of semiannual assessments received by the Savings Association Insurance Fund, net of insurance losses incurred by the Fund.[3]

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[3] So in original.

(D) Application to SAIF members

This paragraph shall become applicable to Savings Association Insurance Fund members on January 1, 1998.

(4) "Semiannual period" defined

For purposes of this section, the term "semiannual period" means a period beginning on January 1 of any calendar year and ending on June 30 of the same year, or a period beginning on July 1 of any calendar year and ending on December 31 of the same year.

(5) Records to be maintained

Each insured depository institution shall maintain all records that the Corporation may require for verifying the correctness of the institution's semiannual assessments. No insured depository institution shall be required to retain those records for that purpose for a period of more than 5 years from the date of the filing of any certified statement, except that when there is a dispute between the insured depository institution and the Corporation over the amount of any assessment, the depository institution shall retain the records until final determination of the issue.

(6) Emergency special assessments

In addition to the other assessments imposed on insured depository institutions under this subsection, the Corporation may impose 1 or more special assessments on insured depository institutions in an amount determined by the Corporation if the amount of any such assessment—

(A) is necessary—

(i) to provide sufficient assessment income to repay amounts borrowed from the Secretary of the Treasury under section 1824(a) of this title in accordance with the repayment schedule

in effect under section 1824(c) of this title during the period with respect to which such assessment is imposed;

(ii) to provide sufficient assessment income to repay obligations issued to and other amounts borrowed from Bank Insurance Fund members under section 1824(d) of this title; or

(iii) for any other purpose the Corporation may deem necessary; and

(B) is allocated between Bank Insurance Fund members and Savings Association Insurance Fund members in amounts which reflect the degree to which the proceeds of the amounts borrowed are to be used for the benefit of the respective insurance funds.

(7) Community enterprise credits

The Corporation shall allow a credit against any semiannual assessment to any insured depository institution which satisfies the requirements of the Community Enterprise Assessment Credit Board under ection 233(a)(1) of the Bank Enterprise Act of 1991 [12 U.S.C. 1834a (a)(1)] in the amount determined by such Board by regulation.

12 U.S.C. § 1817(c) provides:

(c) Certified statements; payments

(1) Certified statements required

(A) In general

Each insured depository institution shall file with the Corporation a certified statement containing such information as the Corporation may require for determining the institution's semiannual assessment.

(B) Form of certification

The certified statement required under subparagraph (A) shall—

(i) be in such form and set forth such supporting information as the Board of Directors shall prescribe; and

(ii) be certified by the president of the depository institution or any other officer designated by its board of directors or trustees that to the best of his or her knowledge and belief, the statement is true, correct and complete, and in accordance with this chapter and regulations issued hereunder.

(2) Payments required

(A) In general

Each insured depository institution shall pay to the Corporation the semiannual assessment imposed under subsection (b) of this section.

(B) Form of payment

The payments required under subparagraph (A) shall be made in such manner and at such time or times as the Board of Directors shall prescribe by regulation.

(3) Newly insured institutions

To facilitate the administration of this section, the Board of Directors may waive the requirements of paragraphs (1) and (2) for the semiannual period in which a depository institution becomes insured.

(4) Penalty for failure to make accurate certified statement

(A) First tier

Any insured depository institution which—

(i) maintains procedures reasonably adapted to avoid any inadvertent error and, unintentionally and as a result of such an error, fails to submit the certified statement under paragraph (1) within the period of time required under paragraph (1) or submits a false or misleading certified statement; or

(ii) submits the statement at a time which is minimally after the time required in such paragraph,

shall be subject to a penalty of not more than $2,000 for each day during which such failure continues or such false and misleading information is not corrected. The institution shall have the burden of proving that an error was inadvertent or that a statement was inadvertently submitted late.

(B) Second tier

Any insured depository institution which fails to submit the certified statement under paragraph (1) within the period of time required under paragraph (1) or submits a false or misleading certified statement in a manner not described in subparagraph (A) shall be subject to a penalty of not more than $20,000 for each day during which such failure continues or such false and misleading information is not corrected.

(C) Third tier

Notwithstanding subparagraphs (A) and (B), if any insured depository institution knowingly or with reckless disregard for the accuracy of any certified statement described in paragraph (1) submits a false or misleading certified statement under paragraph (1), the Corporation may assess a penalty of not more than $1,000,000 or not more than 1 percent of the total assets of the institution, whichever is less, per day for each day during which the failure continues or the false or misleading information in such statement is not corrected.

(D) Assessment procedure

Any penalty imposed under this paragraph shall be assessed and collected by the Corporation in the manner provided in subparagraphs (E), (F), (G), and (I) of section 1818(i)(2) of this title (for penalties imposed under such section) and any such assessment (including the determination of the amount of the penalty) shall be subject to the provisions of such section.

(E) Hearing

Any insured depository institution against which any penalty is assessed under this paragraph shall be afforded an agency hearing if the institution submits a request for such hearing within 20 days after the issuance of the notice of the assessment. Section 1818(h) of this title shall apply to any proceeding under this subparagraph.

12 U.S.C. § 1817(g) provides:

(g) Action by Corporation to recover assessments

The Corporation, in a suit brought at law or in equity in any court of competent jurisdiction, shall be entitled

to recover from any insured depository institution the amount of any unpaid assessment lawfully payable by such insured depository institution to the Corporation, whether or not such depository institution shall have made any such report of condition under subsection (a) of this section and whether or not suit shall have been brought to compel the depository institution to make any such report or file any such statement. No action or proceeding shall be brought for the recovery of any assessment due to the Corporation, or for the recovery of any amount paid to the Corporation in excess of the amount due to it, unless such action or proceeding shall have been brought within five years after the right accrued for which the claim is made, except where the insured depository institution has made or filed with the Corporation a false or fraudulent certified statement with the intent to evade, in whole or in part, the payment of assessment, in which case the claim shall not be deemed to have accrued until the discovery by the Corporation that the certified statement is false or fraudulent: *Provided, however,* That where a cause of action has already accrued, and the period herein prescribed within which an action may be brought has expired, or will expire within one year from September 21, 1950, an action may be brought on such cause of action within one year from September 21, 1950: *And provided further,* That no action or proceeding shall be brought for the recovery of any assessment on deposits alleged to have been omitted from the assessment base of any insured depository institution for any year prior to 1945 except that any claim of the Corporation for the payment of any assessment may be offset by it against any claim of the depository institution for the overpayment of any assessment.

12 U.S.C. § 1818(a) provides:

§ 1818. Termination of status as insured depository institution

(a) Termination of insurance

(1) Voluntary termination

Any insured depository institution which is not—

(A) a national member bank;

(B) a State member bank;

(C) a Federal branch;

(D) a Federal savings association; or

(E) an insured branch which is required to be insured under subsection (a) or (b) of section 3104 of this title,

may terminate such depository institution's status as an insured depository institution if such insured institution provides written notice to the Corporation of the institution's intent to terminate such status not less than 90 days before the effective date of such termination.

(2) Involuntary termination

(A) Notice to primary regulator

If the Board of Directors determines that—

(i) an insured depository institution or the directors or trustees of an insured depository institution have engaged or are engaging in unsafe or unsound practices in conducting the business of the depository institution;

(ii) an insured depository institution is in an unsafe or unsound condition to continue operations as an insured institution; or

(iii) an insured depository institution or the directors or trustees of the insured institution have violated any applicable law, regulation, order, condition imposed in writing by the Corporation in connection with the approval of any application or other request by the insured depository institution, or written agreement entered into between the insured depository institution and the Corporation,

the Board of Directors shall notify the appropriate Federal banking agency with respect to such institution (if other than the Corporation) or the State banking supervisor of such institution (if the Corporation is the appropriate Federal banking agency) of the Board's determination and the facts and circumstances on which such determination is based for the purpose of securing the correction of such practice, condition, or violation. Such notice shall be given to the appropriate Federal banking agency not less than 30 days before the notice required by subparagraph (B), except that this period for notice to the appropriate Federal banking agency may be reduced or eliminated with the agreement of such agency.

(B) Notice of intention to terminate insurance

If, after giving the notice required under subparagraph (A) with respect to an insured depository institution, the Board of Directors determines that any unsafe or unsound practice or condition or any violation specified in

such notice requires the termination of the insured status of the insured depository institution, the Board shall—

(i) serve written notice to the insured depository institution of the Board's intention to terminate the insured status of the institution;

(ii) provide the insured depository institution with a statement of the charges on the basis of which the determination to terminate such institution's insured status was made (or a copy of the notice under subparagraph (A)); and

(iii) notify the insured depository institution of the date (not less than 30 days after notice under this subparagraph) and place for a hearing before the Board of Directors (or any person designated by the Board) with respect to the termination of the institution's insured status.

(3) Hearing; termination

If, on the basis of the evidence presented at a hearing before the Board of Directors (or any person designated by the Board for such purpose), in which all issues shall be determined on the record pursuant to section 554 of title 5 and the written findings of the Board of Directors (or such person) with respect to such evidence (which shall be conclusive), the Board of Directors finds that any unsafe or unsound practice or condition or any violation specified in the notice to an insured depository institution under subparagraph (B) of this subsection [1] or subsection (w) of this section has been established,

[1] So in original.

the Board of Directors may issue an order terminating the insured status of such depository institution effective as of a date subsequent to such finding.

(4) Appearance; consent to termination

Unless the depository institution shall appear at the hearing by a duly authorized representative, it shall be deemed to have consented to the termination of its status as an insured depository institution and termination of such status thereupon may be ordered.

(5) Judicial review

Any insured depository institution whose insured status has been terminated by order of the Board of Directors under this subsection shall have the right to judicial review of such order only to the same extent as provided for the review of orders under subsection (h) of this section.

(6) Publication of notice of termination

The Corporation may publish notice of such termination and the depository institution shall give notice of such termination to each of its depositors at his last address of record on the books of the depository institution, in such manner and at such time as the Board of Directors may find to be necessary and may order for the protection of depositors.

(7) Temporary insurance of deposits insured as of termination

After the termination of the insured status of any depository institution under the provisions of this subsection, the insured deposits of each depositor in the depository institution on the date of such termination, less all subsequent withdrawals from any deposits of such depositor, shall continue for a period of at least 6 months or up to 2 years, within the dis-

cretion of the Board of Directors [2] to be insured, and the depository institution shall continue to pay to the Corporation assessments as in the case of an insured depository institution during such period. No additions to any such deposits and no new deposits in such depository institution made after the date of such termination shall be insured by the Corporation, and the depository institution shall not advertise or hold itself out as having insured deposits unless in the same connection it shall also state with equal prominence that such additions to deposits and new deposits made after such date are not so insured. Such depository institution shall, in all other respects, be subject to the duties and obligations of an insured depository institution for the period the period [3] referred to in the 1st sentence from the date of such termination, and in the event that such depository institution shall be closed on account of inability to meet the demands of its depositors within such period, the Corporation shall have the same powers and rights with respect to such depository institution as in case of an insured depository institution.

(8) Temporary suspension of insurance

(A) In general

If the Board of Directors initiates a termination proceeding under paragraph (2), and the Board of Directors, after consultation with the appropriate Federal banking agency, finds that an insured depository institution (other than a savings association to which subparagraph (B) applies) has no tangible capital under the capital guidelines or regulations of the appropriate Federal banking agency, the Corporation may

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[2] So in original. Probably should be followed by a comma.

[3] So in original.

issue a temporary order suspending deposit insurance on all deposits received by the institution.

(B) Special rule for certain savings institutions

(i) Certain goodwill included in tangible capital

In determining the tangible capital of a savings association for purposes of this paragraph, the Board of Directors shall include goodwill to the extent it is considered a component of capital under section 1464(t) of this title. Any savings association which would be subject to a suspension order under subparagraph (A) but for the operation of this subparagraph, shall be considered by the Corporation to be a "special supervisory association".

(ii) Suspension order

The Corporation may issue a temporary order suspending deposit insurance on all deposits received by a special supervisory association whenever the Board of Directors determines that—

(I) the capital of such association, as computed utilizing applicable accounting standards, has suffered a material decline;

(II) that such association (or its directors or officers) is engaging in an unsafe or unsound practice in conducting the business of the association;

(III) that such association is in an unsafe or unsound condition to con-

tinue operating as an insured association; or

(IV) that such association (or its directors or officers) has violated any applicable law, rule, regulation, or order, or any condition imposed in writing by a Federal banking agency, or any written agreement including a capital improvement plan entered into with any Federal banking agency, or that the asociation has failed to enter into a capital improvement plan which is acceptable to the Corporation within the time period set forth in section 1464(t) of this title.

Nothing in this paragraph limits the right of the Corporation or the Director of the Office of Thrift Supervision to enforce a contractual provision which authorizes the Corporation or the Director of the Office of Thrift Supervision, as a successor to the Federal Savings and Loan Insurance Corporation or the Federal Home Loan Bank Board, to require a savings association to write down or amortize goodwill at a faster rate than otherwise required under this chapter or under applicable accounting standards.

(C) Effective period of temporary order

Any order issued under subparagraph (A) shall become effective not earlier than 10 days from the date of service upon the institution and, unless set aside, limited, or suspended by a court in proceedings authorized hereunder, such temporary order shall remain effective and enforceable until an order of the Board under

paragraph (3) becomes final or until the Corporation dismisses the proceedings under paragraph (3).

(D) Judicial review

Before the close of the 10-day period beginning on the date any temporary order has been served upon an insured depository institution under subparagraph (A), such institution may apply to the United States District Court for the District of Columbia, or the United States district court for the judicial district in which the home office of the institution is located, for an injunction setting aside, limiting, or suspending the enforcement, operation, or effectiveness of such order, and such court shall have jurisdiction to issue such injunction.

(E) Continuation of insurance for prior deposits

The insured deposits of each depositor in such depository institution on the effective date of the order issued under this paragraph, minus all subsequent withdrawals from any deposits of such depositor, shall continue to be insured, subject to the administrative proceedings as provided in this chapter.

(F) Publication of order

The depository institution shall give notice of such order to each of its depositors in such manner and at such times as the Board of Directors may find to be necessary and may order for the protection of depositors.

(G) Notice by Corporation

If the Corporation determines that the depository institution has not substantially complied

with the notice to depositors required by the Board of Directors, the Corporation may provide such notice in such manner as the Board of Directors may find to be necessary and appropriate.

(H) Lack of notice

Notwithstanding subparagraph (A), any deposit made after the effective date of a suspension order issued under this paragraph shall remain insured to the extent that the depositor establishes that—

(i) such deposit consists of additions made by automatic deposit the depositor was unable to prevent; or

(ii) such depositor did not have actual knowledge of the suspension of insurance.

(9) Final decisions to terminate insurance

Any decision by the Board of Directors to—

(A) issue a temporary order terminating deposit insurance; or

(B) issue a final order terminating deposit insurance (other than under subsection (p) or (q) of this section);

shall be made by the Board of Directors and may not be delegated.

(10) Low- to moderate-income housing lender

In making any determination regarding the termination of insurance of a solvent savings association, the Corporation may consider the extent of the association's low- to moderate-income housing loans.

12 U.S.C. § 1818(i) provides:

(i) Jurisdiction and enforcement; penalty

(1) The appropriate Federal banking agency may in its discretion apply to the United States district court, or the United States court of any territory, within the jurisdiction of which the home office of the depository institution is located, for the enforcement of any effective and outstanding notice or order issued under this section or under section 1831*o* or 1831p-1 of this title, and such courts shall have jurisdiction and power to order and require compliance herewith; but except as otherwise provided in this section or under section 1831*o* or 1831p-1 of this title no court shall have jurisdiction to affect by injunction or otherwise the issuance or enforcement of any notice or order under any such section, or to review, modify, suspend, terminate, or set aside any such notice or order.

(2) CIVIL MONEY PENALTY.—

(A) FIRST TIER.—Any insured depository institution which, and any institution-affiliated party who—

(i) violates any law or regulation;

(ii) violates any final order or temporary order issued pursuant to subsection (b), (c), (e), (g), or (s) of this section or any final order under section 1831*o* or 1831p-1 of this title;

(iii) violates any condition imposed in writing by the appropriate Federal banking agency in connection with the grant of any application or other request by such depository institution; or

(iv) violates any written agreement between such depository institution and such agency,

shall forfeit and pay a civil penalty of not more than $5,000 for each day during which such violation continues.

(B) SECOND TIER.—Notwithstanding subparagraph (A), any insured depository institution which, and any institution-affiliated party who—

(i)(I) commits any violation described in any clause of subparagraph (A);

(II) recklessly engages in an unsafe or unsound practice in conducting the affairs of such insured depository institution; or

(III) breaches any fiduciary duty;

(ii) which violation, practice, or breach—

(I) is part of a pattern of misconduct;

(II) causes or is likely to cause more than a minimal loss to such depository institution; or

(III) results in pecuniary gain or other benefit to such party,

shall forfeit and pay a civil penalty of not more than $25,000 for each day during which such violation, practice, or breach continues.

(C) THIRD TIER.—Notwithstanding subparagraphs (A) and (B), any insured depository institution which, and any institution-affiliated party who—

(i) knowingly—

(I) commits any violation described in any clause of subparagraph (A);

(II) engages in any unsafe or unsound practice in conducting the affairs of such depository institution; or

(III) breaches any fiduciary duty; and

(ii) knowingly or recklessly causes a substantial loss to such depository institution or a substantial pecuniary gain or other benefit to such party by reason of such violation, practice, or breach,

shall forfeit and pay a civil penalty in an amount not to exceed the applicable maximum amount determined under subparagraph (D) for each day during which such violation, practice, or breach continues.

(D) MAXIMUM AMOUNTS OF PENALTIES FOR ANY VIOLATION DESCRIBED IN SUBPARAGRAPH (c). The maximum daily amount of any civil penalty which may be assessed pursuant to subparagraph (C) for any violation, practice, or breach described in such subparagraph is—

(i) in the case of any person other than an insured depository institution, an amount to not exceed $1,000,000; and

(ii) in the case of any insured depository institution, an amount not to exceed the lesser of—

(I) $1,000,000; or

(II) 1 percent of the total assets of such institution.

(E) ASSESSMENT.—

(i) WRITTEN NOTICE.—Any penalty imposed under subparagraph (A), (B), or (C) may be assessed and collected by the appropriate Federal banking agency by written notice.

(ii) FINALITY OF ASSESSMENT.—If, with respect to any assessment under clause (i), a

hearing is not requested pursuant to subparagraph (H) within the period of time allowed under such subparagraph, the assessment shall constitute a final and unappealable order.

(F) AUTHORITY TO MODIFY OR REMIT PENALTY.—Any appropriate Federal banking agency may compromise, modify, or remit any penalty which such agency may assess or had already assessed under subparagraph (A), (B), or (C).

(G) MITIGATING FACTORS.—In determining the amount of any penalty imposed under subparagraph (A), (B), or (C), the appropriate agency shall take into account the appropriateness of the penalty with respect to—

(i) the size of financial resources and good faith of the insured depository institution or other person charged;

(ii) the gravity of the violation;

(iii) the history of previous violations; and

(iv) such other matters as justice may require.

(H) HEARING.—The insured depository institution or other person against whom any penalty is assessed under this paragraph shall be afforded an agency hearing if such institution or person submits a request for such hearing within 20 days after the issuance of the notice of assessment.

(I) COLLECTION.—

(i) REFERRAL.—If any insured depository institution or other person fails to pay an assessment after any penalty assessed under this paragraph has become final, the agency that imposed the penalty shall recover the amount assessed

by action in the appropriate United States district court.

(ii) APPROPRIATENESS OF PENALTY NOT REVIEWABLE.—In any civil action under clause (i), the validity and appropriateness of the penalty shall not be subject to review.

(J) DISBURSEMENT.—All penalties collected under authority of this paragraph shall be deposited into the Treasury.

(K) REGULATIONS.—Each appropriate Federal banking agency shall prescribe regulations establishing such procedures as may be necessary to carry out this paragraph.

(3) NOTICE UNDER THIS SECTION AFTER SEPARATION FROM SERVICE.—The resignation, termination of employment or participation, or separation of a institution-affiliated party (including a separation caused by the closing of an insured depository institution) shall not affect the jurisdiction and authority of the appropriate Federal banking agency to issue any notice and proceed under this section against any such party, if such notice is served before the end of the 6-year period beginning on the date such party ceased to be such a party with respect to such depository institution (whether such date occurs before, on, or after August 9, 1989).

(4) PREJUDGEMENT ATTACHMENT.—

(A) IN GENERAL.—In any action brought by an appropriate Federal banking agency (excluding the Corporation when acting in a manner described in section 1821(d)(18) of this title) pursuant to this section, or in actions brought in aid of, or to enforce an order in, any administrative or other civil action for money damages, restitution, or civil money penalties brought by such agency, the court may, upon application of the agency, issue a restraining order that—

(i) prohibits any person subject to the proceeding from withdrawing, transferring, removing, dissipating, or disposing of any funds, assets or other property; and

(ii) appoints a temporary receiver to administer the restraining order.

(B) STANDARD.—

(i) SHOWING.—Rule 65 of the Federal Rules of Civil Procedure shall apply with respect to any proceeding under subparagraph (A) without regard to the requirement of such rule that the applicant show that the injury, loss, or damage is irreparable and immediate.

(ii) STATE PROCEEDING.—If, in the case of any proceeding in a State court, the court determines that rules of civil procedure available under the laws of such State provide substantially similar protections to a party's right to due process as Rule 65 (as modified with respect to such proceeding by clause (i)), the relief sought under subparagraph (A) may be requested under the laws of such State.

12 U.S.C. § 1827 provides:

(a) Annual reports on BIF, SAIF, and the FSLIC Resolution Fund

(1) In general

The Corporation shall annually submit a full report of its operations, activities, budget, receipts, and expenditures for the preceding 12-month period. The report shall include, with respect to the Bank Insurance Fund, the Savings Association Insurance Fund, and the FSLIC Resolution Fund, an analysis by the Corporation of—

(A) the current financial condition of each fund;

(B) the purpose, effect, and estimated cost of each resolution action taken for an insured depository institution during the preceding year;

(C) the extent to which the actual costs of assistance provided to, or for the benefit of, an insured depository institution during the preceding year exceeded the estimated costs of such assistance reported in a previous year under paragraph (A);

(D) the exposure of each insurance fund to changes in those economic factors most likely to affect the condition of that fund;

(E) a current estimate of the resources needed for the Bank Insurance Fund, the Savings Association Insurance Fund, or the FSLIC Resolution Fund to achieve the purposes of this chapter; and

(F) any findings, conclusions, and recommendations for legislative and administrative actions considered appropriate to future resolution activities by the Corporation.

(2) Manner of submission

Such report shall be submitted to the President of the Senate and the Speaker of the House of Representatives, who shall cause the same to be printed for the information of Congress, and the President as soon as practicable after the first day of January each year.

(b) Quarterly reports to Treasury

(1) Financial operating plans and forecasts

Before the beginning of each fiscal quarter, the Corporation shall provide to the Secretary of the Treasury a copy of the Corporation's financial operating plans and forecasts.

(2) Financial condition and reports of operations

As soon as practicable after the end of each fiscal quarter, the Corporation shall submit to the Secretary of the Treasury a copy of the report of the Corporation's financial condition as of the end of such fiscal quarter and the results of the Corporation's operations during such fiscal quarter.

(3) Items to be included

The plans, forecases, and reports required under this subsection shall reflect the estimates required to be made under section 1825(b) of this title of the liabilities and obligations of the Corporation described in such section.

(4) Rule of construction

The requirement to provide plans, forecasts, and reports to the Secretary of the Treasury under this subsection may not be construed as implying any obligation on the part of the Corporation to obtain the consent or approval of such Secretary with respect to such plans, forecasts, and reports.

(c) Reports to OMB

(1) Financial information

The Corporation shall continue to provide to the Director of the Office of Management and Budget

financial information consistent with that contained in the reports that were being provided to the Director immediately prior to the effective date of the Financial Institutions Reform, Recovery, and Enforcement Act of 1989.

(2) Financial operating plans and forecasts

The Corporation shall also provide to the Director copies of the Corporation's financial operating plans and forecasts as prepared by the Corporation in the ordinary course of its operations, and copies of the quarterly reports of the Corporation's financial condition and results of operations as prepared by the Corporation in the ordinary course of its operations.

(3) Rule of construction

This subsection may not be construed as implying any obligation on the part of the Corporation to consult with or obtain the consent or approval of the Director with respect to any reports, plans, forecasts, or other information referred to in paragraph (1) or (2) or any jurisdiction or oversight over the affairs or operations of the Corporation.

(d) Audit

(1) Audit required

The Comptroller General shall audit annually the financial transactions of the Corporation, the Bank Insurance Fund, the Savings Association Insurance Fund, and the FSLIC Resolution Fund in accordance with generally accepted government auditing standards.

(2) Access to books and records

All books, records, accounts, reports, files, and property belonging to or used by the Corporation,

the Bank Insurance Fund, the Savings Association Insurance Fund, and the FSLIC Resolution Fund, or by an independent certified public accountant retained to audit the Fund's financial statements, shall be made available to the Comptroller General.

(e) Audit of Corporation

The financial transactions of the Corporation shall be audited by the General Accounting Office in accordance with the principles and procedures applicable to commercial corporate transactions and under such rules and regulations as may be prescribed by the Comptroller General of the United States. The audit shall be conducted at the place or places where accounts of the Corporation are normally kept. The representatives of the General Accounting Office shall have access to all books, accounts, records, reports, files, and all other papers, things, or property belonging to or in use by the Corporation pertaining to its financial transactions and necessary to facilitate the audit, and they shall be afforded full facilities for verifying transactions with the balances or securities held by depositaries, fiscal agents, and custodians. All such books, accounts, record, reports, files, papers, and property of the Corporation shall remain in possession and custody of the Corporation. The audit shall begin with financial transactions occurring on and after August 31, 1948. The Corporation shall be audited at least once in every three years.

(f) Report of audit

A report of each audit conducted under subsection (b) of this section shall be made by the Comptroller General to the Congress not later than six and one-half months following the close of the last year covered by such audit. The report to the Congress shall set forth the scope of the audit and shall include a statement of assets and liabilities and surplus or deficit; a statement of surplus or deficit analysis; a statement of income and ex-

penses; a statement of sources and application of funds and such comments and information as may be deemed necessary to inform Congress of the financial operations and conditions of the Corporation, together with such recommendations with respect thereto as the Comptroller General may deem advisable. The report shall also show specifically any program, expenditure, or other financial transaction or undertaking observed in the course of the audit, which, in the opinion of the Comptroller General, has been carried on or made without authority of law. A copy of each report shall be furnished to the President, to the Secretary of the Treasury, and to the Corporation at the time submitted to the Congress.

(g) Assistance in audit; costs

For the purpose of conducting such audit the Comptroller General is authorized in his discretion to employ by contract, without regard to section 5 of title 41, professional services of firms and organizations of certified public accountants, with the concurrence of the Corporation, for temporary periods or for special purposes. The Corporation shall reimburse the General Accounting Office for the cost of any such audit as billed therefor by the Comptroller General, and the General Accounting Office shall deposit the sums so reimbursed into the Treasury as miscellaneous receipts.

(h) Additional reports

(1) In general

In addition to the reports required under subsections (a), (b), and (c) of this section, the Corporation shall submit to Congress not later than April 30 and October 31 of each year, a semiannual report on the activities and efforts of the Corporation for the 6-month period ending on the last day of the month prior to the month in which such report is required to be submitted.

(2) Contents of report

Each semiannual report required under this subsection shall include the following information with respect to the Corporation's assets and liabilities and the assets and liabilities of institutions for which the Corporation serves as a conservator or receiver.

(A) A statement of the total book value of all assets held or managed by the Corporation at the beginning and end of the reporting period.

(B) A statement of the total book value of such assets which are under contract to be managed by private persons and entities at the beginning and end of the reporting period.

(C) The number of employees of the Corporation at the beginning and end of the reporting period.

(D) A statement of the total amount expended on private contractors for the management of such assets.

(E) A statement of the efforts of the Corporation to maximize the efficient utilization of the resources of the private sector during the reporting period and in future reporting periods and a description of the policies and procedures adopted to ensure adequate competition and fair and consistent treatment of qualified third parties seeking to provide services to the Corporation.

PORTIONS OF THE FEDERAL DEPOSIT INSURANCE CORPORATION IMPROVEMENT ACT OF 1991

Federal Deposit Insurance Corporation Improvement Act of 1991, Section 302, 105 Stat. 2345, provides in pertinent part

SEC. 302. RISK-BASED ASSESSMENTS.

(a) RISK-BASED ASSESSMENT SYSTEM.—Section 7(b) of the Federal Deposit Insurance Act (12 U.S.C. 1817 (b)) is amended to read as follows:

"(b) ASSESSMENTS.—

"(1) RISK-BASED ASSESSMENT SYSTEM.—

"(A) RISK-BASED ASSESSMENT SYSTEM REQUIRED.—The Board of Directors shall, by regulation, establish a risk-based assessment system for insured depository institutions.

"(B) PRIVATE REINSURANCE AUTHORIZED.—In carrying out this paragraph, the Corporation may—

"(i) obtain private reinsurance covering not more than 10 percent of any loss the Corporation incurs with respect to an insured depository institution; and

"(ii) base that institution's semiannual assessment (in whole or in part) on the cost of the reinsurance.

"(C) RISK-BASED ASSESSMENT SYSTEM DEFINED.—For purposes of this paragraph, the term 'risk-based assessment system' means a system for calculating a depository institution's semiannual assessment based on—

"(i) the probability that the deposit insurance fund will incur a loss with re-

spect to the institution, taking into consideration the risks attributable to—

"(I) different categories and concentrations of assets;

"(II) different categories and concentrations of liabilities, both insured and uninsured, contingent and noncontingent; and

"(III) any other factors the Corporation determines are relevant to assessing such probability.

"(ii) the likely amount of any such loss; and

"(iii) the revenue needs of the deposit insurance fund.

"(D) SEPARATE ASSESSMENT SYSTEMS.—The Board of Directors may establish separate risk-based assessment systems for large and small members of each deposit insurance fund.

"(2) SETTING ASSESSMENTS.—

"(A) ACHIEVING AND MAINTAINING DESIGNATED RESERVE RATIO.—

"(i) IN GENERAL.—The Board of Directors shall set semiannual assessments for insured depository institutions—

"(I) to maintain the reserve ratio of each deposit insurance fund at the designated reserve ratio; or

"(II) if the reserve ratio is less than the designated reserve ratio, to increase the reserve ratio to the designated reserve ratio as provided in paragraph (3).

"(ii) FACTORS TO BE CONSIDERED.—In carrying out clause (i), the Board of Directors shall consider the deposit insurance fund's—

"(I) expected operating expenses,

"(II) case resolution expenditures and income,

"(III) the effect of assessments on members' earnings and capital, and

"(IV) any other factors that the Board of Directors may deem appropriate.

"(iii) MINIMUM ASSESSMENT. — The semiannual assessment for each member of a deposit insurance fund shall be not less than $1,000.

"(iv) DESIGNATED RESERVE RATIO DEFINED.—The designated reserve ratio of each deposit insurance fund for each year shall be—

"(I) 1.25 percent of estimated insured deposits; or

"(II) a higher percentage of estimated insured deposits that the Board of Directors determines to be justified for that year by circumstances raising a significant risk of substantial future losses to the fund.

"(B) INDEPENDENT TREATMENT OF FUNDS.—The Board of Directors shall—

"(i) set semiannual assessments for members of each deposit insurance fund independently from semiannual assessments

for members of any other deposit insurance fund; and

"(ii) set the designated reserve ratio of each deposit insurance fund independently from the designated reserve ratio of any other deposit insurance fund.

"(C) NOTICE OF ASSESSMENTS.—The Corporation shall notify each insured depository institution of that institution's semiannual assessment.

"(D) PRIORITY OF FINANCING CORPORATION AND FUNDING CORPORATION ASSESSMENTS.—Notwithstanding any other provision of this paragraph, amounts assessed by the Financing Corporation under section 21 of the Federal Home Loan Bank Act against Savings Association Insurance Fund members, shall be subtracted from the amounts authorized to be assessed by the Corporation under this paragraph.

"(E) MINIMUM ASSESSMENTS.—The Corporation shall design the risk-based assessment system for any deposit insurance fund so that, if the Corporation has borrowings outstanding under section 14 on behalf of that fund or the reserve ratio of that fund remains below the designated reserve ratio, the total amount raised by semiannual assessments on members of that fund shall be not less than the total amount that would have been raised if—

"(i) section 7(b) as in effect on July 15, 1991 remained in effect; and

"(ii) the assessment rate in effect on July 15, 1991 remained in effect.

"(F) TRANSITION RULE FOR SAVINGS ASSOCIATION INSURANCE FUND.—With respect to the

Savings Association Insurance Fund, during the period beginning on the effective date of the amendments made by section 302(a) of the Federal Deposit Insurance Corporation Improvement Act of 1991 and ending on December 31, 1997—

"(i) subparagraph (A)(i)(II) shall apply as if such subparagraph did not include 'as provided in paragraph (3)'; and

"(ii) subparagraph (E) shall be applied by substituting 'if section 7(b) as in effect on July 15, 1991 remained in effect.' for 'if—' and all that follows through clause (ii).

"(G) SPECIAL RULE UNTIL THE INSURANCE FUNDS ACHIEVE THE DESIGNATED RESERVE RATIO.—Until a deposit insurance fund achieves the designated reserve ratio, the Corporation may limit the maximum assessment on insured depository institutions under the risk-based assessment system authorized under paragraph (1) to not less than 10 basis points above the average assessment on insured depository institutions under that system.

"(3) SPECIAL RULE FOR RECAPITALIZING UNDERCAPITALIZED FUNDS.—

"(A) IN GENERAL.—Except as provided in paragraph (2)(F), if the reserve ratio of any deposit insurance fund is less than the designated reserve ratio under paragraph (2)(A)(iv), the Board of Directors shall set semiannual assessment rates for members of that fund—

"(i) that are sufficient to increase the reserve ratio for that fund to the desig-

nated reserve ratio not later than 1 year after such rates are set; or

"(ii) in accordance with a schedule promulgated by the Corporation under subparagraph (B).

"(B) RECAPITALIZATION SCHEDULES.—For purposes of subparagraph (A)(ii), the Corporation shall by regulation promulgate a schedule that specifies, at semiannual intervals, target reserve ratios for that fund, culminating in a reserve ratio that is equal to the designated reserve ratio not later than 15 years after the date on which the schedule is implemented.

"(C) AMENDING SCHEDULE.—The Corporation may, by regulation, amend a schedule promulgated under subparagraph (B), but such amendments may not extend the date specified in subparagraph (B).

"(D) APPLICATION TO SAIF MEMBERS.—This paragraph shall become applicable to Savings Association Insurance Fund members on January 1, 1998.

"(4) SEMIANNUAL PERIOD DEFINED.—For purposes of this section, the term 'semiannual period' means a period beginning on January 1 of any calendar year and ending on June 30 of the same year, or a period beginning on July 1 of any calendar year and ending on December 31 of the same year.

"(5) RECORDS TO BE MAINTAINED.—Each insured depository institution shall maintain all records that the Corporation may require for verifying the correctness of the institution's semiannual assessments. No insured depository institution shall be required to retain those records for that purpose for a period of more than 5 years from the date of the filing of

any certified statement, except that when there is a dispute between the insured depository institution and the Corporation over the amount of any assessment, the depository institution shall retain the records until final determination of the issue.".

(b) CERTIFIED STATEMENTS AND PAYMENT PROCEDURES.—Section 7(c) of the Federal Deposit Insurance Act (12 U.S.C. 1817(c)) is amended to read as follows:

"(c) CERTIFIED STATEMENTS; PAYMENTS.—

"(1) CERTIFIED STATEMENTS REQUIRED.—

"(A) IN GENERAL.—Each insured depository institution shall file with the Corporation a certified statement containing such information as the Corporation may require for determining the institution's semiannual assessment.

"(B) FORM OF CERTIFICATION.—The certified statement required under subparagraph (A) shall—

"(i) be in such form and set forth such supporting information as the Board of Directors shall prescribe; and

"(ii) be certified by the president of the depository institution or any other officer designated by its board of directors or trustees that to the best of his or her knowledge and belief, the statement is true, correct and complete, and in accordance with this Act and regulations issued hereunder.

"(2) PAYMENTS REQUIRED.—

"(A) IN GENERAL.—Each insured depository institution shall pay to the Corporation the semiannual assessment imposed under subsection (b).

"(B) FORM OF PAYMENT.—The payments required under subparagraph (A) shall be made in such manner and at such time or times as the Board of Directors shall prescribe by regulation.

"(3) NEWLY INSURED INSTITUTIONS.—To facilitate the administration of this section, the Board of Directors may waive the requirements of paragraphs (1) and (2) for the semiannual period in which a depository institution becomes insured.".

(c) REGULATIONS.—To implement the risk-based assessment system required under section 7(b) of the Federal Deposit Insurance Act (as amended by subsection (a)), the Federal Deposit Insurance Corporation shall—

(1) provide notice of proposed regulations in the Federal Register, not later than December 31, 1992, with an opportunity for comment on the proposal of not less than 120 days; and

(2) promulgate final regulations not later than July 1, 1993.

(d) AUTHORITY TO PRESCRIBE REGULATIONS AND DEFINITIONS.—Section 10 of the Federal Deposit Insurance Act (12 U.S.C. 1820) is amended by adding at the end the following:

"(f) AUTHORITY TO PRESCRIBE REGULATIONS AND DEFINITIONS.—Except to the extent that authority under this Act is conferred on any of the Federal banking agencies other than the Corporation, the Corporation may—

"(1) prescribe regulations to carry out this Act; and

"(2) by regulation define terms as necessary to carry out this Act.".

(e) CONFORMING AMENDMENTS.—The Federal Deposit Insurance Act (12 U.S.C. 1811 et seq.) is amended—

(1) in section 5(d)(3)(B)—

(A) by striking "average assessment base" and inserting "deposits"; and

(B) by striking "shall—" and all that follows through "(iii) shall be treated" and inserting "shall be treated";

(2) in section 7(a)(5) by striking "and for the computation of assessments provided in subsection (b) of this section";

(3) in section 7 by amending subsection (d) to read as follows:

"(d) CORPORATION EXEMPT FROM APPORTIONMENT.—Notwithstanding any other provision of law, amounts received pursuant to any assessment under this section and any other amounts received by the Corporation shall not be subject to apportionment for the purposes of chapter 15 of title 31, United States Code, or under any other authority."; and

(4) in the last sentence of section 8(q) by striking "upon" and inserting "with respect to".

(f) TRANSITION TO NEW ASSESSMENT SYSTEM.—To carry out the amendments made by this section, the Corporation may promulgate regulations governing the transition from the assessment system in effect on the date of enactment of this Act to the assessment system required under the amendments made by this section.

(g) EFFECTIVE DATE OF AMENDMENTS.—The amendments made by this section shall become effective on the earlier of—

(1) 180 days after the date on which final regulations promulgated in accordance with subsection (c) become effective; or

(2) January 1, 1994.

PORTIONS OF THE FDIC'S REGULATIONS

12 C.F.R. § 327.3 (1993) provides:

(a) *Required*—(1) *In general.* Except as provided in paragraph (a)(2) of this section, each insured depository institution shall pay the amount of the semiannual assessment due for the current semiannual period, as shown on its certified statement for such period.

(2) *Newly insured institutions.* A newly insured institution shall not be required to pay an assessment for the semiannual period during which it becomes an insured institution.

(b) *Responsibility for computation.* Each insured depository institution shall be responsible for computing the amount of its own assessment.

(c) *Amount.* The semiannual assessment to be paid by each insured depository institution for the current semiannual period shall be computed by multiplying the institution's average assessment base for the prior semiannual period by one-half the annual assessment rate applicable to such institution.

(d) *Annual assessment rate*—(1) *Assessment risk classification.* For the purpose of determining the annual assessment rate for BIF members under § 327.13(c) and the annual assessment rate for SAIF members under § 327.23(d), each insured institution will be assigned an "assessment risk classification." By the first day of the month preceding each semiannual period, each institution will be provided notice of its assessment risk classification for that period. Each institution's assessment risk classification, which will be composed of a group and a subgroup assignment, will be based on the following capital factors and supervisory evaluations:

(i) *Capital factors.* Institutions will be assigned to one of the following three capital groups on the basis of data

reported in the institution's Report of Income and Condition, or Thrift Financial Report containing the necessary capital data, for the report date that is closest to the last day of the seventh month preceding the current semi-annual period.

(A) *Well capitalized.* For assessment risk classification purposes, the short-form designation for well-capiatlized institutions is "1".

(*1*) Except as provided in paragraph (d)(1)(i)(A)(*2*) of this section, this group consists of institutions satisfying each of the following capital ratio standards: Total risk-based ratio, 10.0 percent or greater, Tier 1 risk-based ratio, 6.0 percent or greater; and Tier 1 leverage ratio, 5.0 percent or greater.

(*2*) For purposes of assessment risk classification, an insured branch of a foreign bank shall be deemed to be well capitalized if the insured branch maintains the pledge of assets required under 12 CFR 346.19, and the eligible assets prescribed under 12 CFR 346.20 at 108 percent or more of the preceding quarter's average book value of the insured branch's third-party liabilities.

(B) *Adequately capitalized.* For assessment risk classification purposes, the short-form designation for adequately capitalized institutions is "2".

(*1*) Except as provided in (d)(1)(i)(B)(*2*) of this section, this group consists of institutions that do not satisfy the standards of "well capitalized" under this paragraph but which satisfy each of the following capital ratio standards: Total risk-based ratio, 8.0 percent or greater; Tier 1 risk-based ratio, 4.0 percent or greater; and Tier 1 Leverage ratio, 4.0 percent or greater.

(*2*) For purposes of assessment risk classification, an insured branch of a foreign bank shall be deemed to be adequately capitalized if the insured branch:

(*i*) Maintains the pledge of assets required under 12 CFR 346.19;

(*ii*) Maintains the eligible assets prescribed under 12 CFR 346.20 at 106 percent or more of the preceding quarter's average book value of the insured branch's third-party liabilities; and

(*iii*) Does not meet the definition of a well capitalized insured branch of a foreign bank.

(C) *Undercapitalized.* For assessment risk classification purposes, the short-form designation for this group is "3". This group consists of institutions that do not qualify as either "well capitalized" or "adequately capitalized" under paragraphs (d)(1)(i)(A) and (B) of this section.

(ii) *Supervisory evaluations.* Within its capital group, each institution will be assigned to one of three subgroups on the basis of supervisory evaluations by the institution's primary federal supervisor and, if applicable, state supervisor; and such other information as the Corporation determines to be relevant to the institution's financial condition and the risk posed to the BIF or SAIF. The three supervisory subgroups are:

(A) *Subgroup "A".* This subgroup consists of financially sound institutions with only a few minor weaknesses;

(B) *Subgroup "B".* This subgroup consists of institutions that demonstrate weaknesses which, if not corrected, could result in significant deterioration of the institution and increased risk of loss to the BIF or SAIF; and

(C) *Subgroup "C".* This subgroup consists of institutions that pose a substantial probability of loss to the BIF or SAIF unless effective corrective action is taken.

(2) *Classification notice not provided; applicable assessment rate.* Any institution to which notice of its assessment risk classification for the current semiannual period is not provided by the first day of the period shall preliminarily compute its assessment based on the rate

applicable to the classification designated "2A" in the rate schedule set forth in § 327.13(c)(2), if the institution is a BIF member, or the schedule in § 327.23(d)(2), if the institution is a SAIF member. If such institution is subsequently assigned for that period an assessment risk classification other than that designated in the schedule as "2A", any excess assessment paid by the institution pursuant to the preceding sentence shall promptly be refunded by the Corporation, with interest, and any additional assessment owed shall promptly be paid by the institution, with interest. Interest payable under this paragraph shall be at the rate provided for in § 327.7(b).

(e) *Classification for certain types of institutions.* The annual assessment rate applicable to institutions that are bridge banks under 12 U.S.C. 1821(n) and to institutions for which either the Corporation or the Resolution Trust Corporation has been appointed conservator shall in all cases be the rate applicable to the classification designated as "2A" in the schedules set forth in §§ 327.13 (c)(2) and 327.23(d)(2).

(f) *Requests for review.* An institution may submit a written request for review of its assessment risk classification. Any such request must be submitted within 30 days of the date of the assessment risk classification notice provided by the Corporation pursuant to paragraph (d)(1) of this section. The request shall be submitted to the Corporation's Director of the Division of Supervision in Washington, DC, and shall include documentation sufficient to support the reclassification sought by the institution. If additional information is requested by the Corporation, such information shall be provided by the institution within 21 days of the date of the request for additional information. A request for review may include a request for an informal hearing. Any institution submitting a timely request for review will receive written notice from the Corporation regarding the outcome of its request. Notice of the procedures applicable to reviews

and hearings will be included with the assessment risk classification notice to be provided pursuant to paragraph (d)(1) of this section.

(g) *Limited use of assessment risk classification.* The assignment of a particular assessment risk classification to a depository institution under this part 327 is for purposes of implementing and operating a transitional risk-based assessment system. Unless permitted by the Corporation or otherwise required by law, no institution may state in any advertisement or promotional material the assessment risk classification assigned to it pursuant to this part.

(h) *Disclosure restrictions.* The supervisory subgroup to which an institution is assigned by the Corporation pursuant to paragraph (d)(1) of this section is deemed to be exempt information within the scope of § 309.5 (c)(8) of this chapter and, accordingly, is governed by the disclosure restrictions set out at § 309.6 of this chapter.

12 C.F.R. § 327.3 (1994) provides:

(a) *Required*—(1) *In general.* Except as provided in paragraph (a)(2) of this section, each insured depository institution shall pay the amount of the semiannual assessment due for the current semiannual period, as shown on its certified statement for such period.

(2) *Newly insured institutions.* A newly insured institution shall not be required to pay an assessment for the semiannual period during which it becomes an insured institution.

(b) *Responsibility for computation.* Each insured depository institution shall be responsible for computing the amount of its own assessment.

(c) *Amount.* Except as provided in paragraph (d) of this section, the semiannual assessment to be paid by each insured depository institution for the current semi-

annual period shall be computed by multiplying the institution's average assessment base for the prior semiannual period by one-half the annual assessment rate applicable to such institution.

(d) *Lifeline accounts.* The portion of an institution's average assessment base that is attributable to deposits in lifeline accounts pursuant to the Bank Enterprise Act, 12 U.S.C. 1834, will be assessed at such rate as may be established by the Corporation pursuant to 12 U.S.C. 1834 and section 7(b)(2)(H) of the Federal Deposit Insurance Act, as amended, 12 U.S.C. 1817(b)(2)(H).

(e) *Annual assessment rate*—(1) *Assessment risk classification.* For the purpose of determining the annual assessment rate for BIF members under § 327.13(c) and the annual assessment rate for SAIF members under § 327.23(d), each insured institution will be assigned an "assessment risk classification". By the first day of the month preceding each semiannual period, each institution will be provided notice of its assessment risk classification for that period. Each institution's assessment risk classification, which will be composed of a group and a subgroup assignment, will be based on the following capital and supervisory factors:

(i) *Capital factors.* Institutions will be assigned to one of the following three capital groups on the basis of data reported in the institution's Report of Income and Condition, Report of Assets and Liabilities of U.S. Branches and Agencies of Foreign Banks, or Thrift Financial Report containing the necessary capital data, for the report date that is closest to the last day of the seventh month preceding the current semiannual period.

(A) *Well capitalized.* For assessment risk classification purposes, the short-form designation for this group is "1".

(*1*) Except as provided in paragraph (e)(1)(i)(A)(*2*) of this section, this group consists of institutions satisfying each of the following capital ratio standards: Total risk-

based ratio, 10.0 percent or greater; Tier 1 risk-based ratio, 6.0 percent or greater; and Tier 1 leverage ratio, 5.0 percent or greater. New insured depository institutions coming into existence after the report date specified in paragraph (e)(1)(i) of this section will be included in this group for the first semiannual period for which they are required to pay assessments.

(*2*) For purposes of assessment risk classification, an insured branch of a foreign bank will be deemed to be "well capitalized" if the insured branch maintains the pledge of assets required under 12 CFR 346.19, and maintains the eligible assets prescribed under 12 CFR 346.20 at 108 percent or more of the average book value of the insured branch's third-party liabilities for the quarter ending on the report date specified in paragraph (e)(1)(i) of this section.

(B) *Adequately capitalized.* For assessment risk classification purposes, the short-form designation for adequately capitalized institutions is "2".

(*1*) Except as provided in (e)(1)(i)(B)(*2*) of this section, this group consists of institutions that do not satisfy the standards for "well capitalized" under this paragraph but which satisfy each of the following capital ratio standards: Total risk-based ratio, 8.0 percent or greater; Tier 1 risk-based ratio, 4.0 percent or greater; and Tier 1 Leverage ratio, 4.0 percent or greater.

(*2*) For purposes of assessment risk classification, an insured branch of a foreign bank will be deemed to be "adequately capitalized" if the insured branch:

(*i*) Maintains the pledge of assets required under 12 CFR 346.19;

(*ii*) Maintains the eligible assets prescribed under 12 CFR 346.20 at 106 percent or more of the average book value of the insured branch's third-party liabilities for the

quarter ending on the report date specified in paragraph (e)(1)(i) of this section; and

(*iii*) Does not meet the definition of a well capitalized insured branch of a foreign bank.

(C) *Undercapitalized.* For assessment risk classification purposes, the short-form designation for this group is "3". This group consists of institutions that do not qualify as either "well capitalized" or "adequately capitalized" under paragraphs (e)(1)(i)(A) and (B) of this section.

(ii) *Supervisory risk factors.* Within its capital group, each institution will be assigned to one of three subgroups based on the Corporation's consideration of supervisory evaluations provided by the institution's primary federal regulator. The supervisory evaluations include the results of examination findings by the primary federal regulator, as well as other information the primary federal regulator determines to be relevant. In addition, the Corporation will take into consideration such other information (such as state examination findings, if appropriate) as it determines to be relevant to the institution's financial condition and the risk posed to the BIF or SAIF. Authority to set dates applicable to the determination of supervisory subgroup assignments is delegated to the Corporation's Director of the Division of Supervision (or his or her designee). The three supervisory subgroups are:

(A) *Subgroup "A".* This subgroup consists of financially sound institutions with only a few minor weaknesses;

(B) *Subgroup "B".* This subgroup consists of institutions that demonstrate weaknesses which, if not corrected, could result in significant deterioration of the institution and increased risk of loss to the BIF or SAIF; and

(C) *Subgroup "C".* This subgroup consists of institutions that pose a substantial probability of loss to the BIF or SAIF unless effective corrective action is taken.

(2) *Payment of assessment at rate assigned.* Institutions shall make timely payment of assessments based on the assessment risk classification assigned in the notice provided to the institution pursuant to paragraph (e)(1) of this section. Timely payment is required notwithstanding any request for review filed pursuant to paragraph (g) of this section. Any institution to which notice of its assessment risk classification for the current semiannual period is not provided by the first day of the period shall preliminarily compute its assessment based on the rate applicable to the classification designated "2A" in the rate schedule set forth in § 327.13(c)(2) if the institution is a BIF member or in § 327.23(d)(2) if the institution is a SAIF member. If such institution is subsequently assigned for that period an assessment risk classification other than that designated as "2A", or if the classification assigned to an institution in the notice provided under paragraph (e)(1) of this section is subsequently changed, any excess assessment timely paid by the institution will promptly be refunded or credited by the Corporation, with interest, and any additional assessment owed shall promptly be paid by the institution, with interest. Interest payable under this paragraph shall be at the rate provided for in § 327.7(b) of this part.

(f) *Classification for certain types of institutions.* The annual assessment rate applicable to institutions that are bridge banks under 12 U.S.C. 1821(n) and to institutions for which either the Corporation or the Resolution Trust Corporation has been appointed conservator shall in all cases be the rate applicable to the classification designated as "2A" in the schedules set forth in §§ 327.13 (c)(2) and 327.23(d)(2).

(g) *Requests for review.* An institution may submit a written request for review of its assessment risk classification. Any such request must be submitted within 30 days of the date of the assessment risk classification

notice provided by the Corporation pursuant to paragraph (e)(1) of this section. The requests shall be submitted to the Corporation's Director of the Division of Supervision in Washington, DC, and shall include documentation sufficient to support the reclassification sought by the institution. If additional information is requested by the Corporation, such information shall be provided by the institution within 21 days of the date of the request for the additional information. Any institution submitting a timely request for review will receive written notice from the Corporation regarding the outcome of its request. Upon completion of a review, the Director of the Division of Supervision (or his or her designee) shall promptly notify the institution in writing of the FDIC's determination of whether reclassification is warranted. Notice of the procedures applicable to reviews will be included with the assessment risk classification notice to be provided pursuant to paragraph (e)(1) of this section.

(h) *Limited use of assessment risk classification.* The assignment of a particular assessment risk classification to a depository institution under this part 327 is for purposes of implementing and operating a risk-based assessment system. Unless permitted by the Corporation or otherwise required by law, no institution may state in any advertisement or promotional material the assessment risk classification assigned to it pursuant to this part.

(i) *Disclosure restrictions.* The supervisory subgroup to which an institution is assigned by the Corporation pursuant to paragraph (e)(1) of this section is deemed to be exempt information within the scope of § 309.5 (c)(8) of this chapter and, accordingly, is governed by the disclosure restrictions set out at § 309.6 of this chapter.

(2)

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In The

Supreme Court of the United States

October Term, 1995

DOOLIN SECURITY SAVINGS BANK, F.S.B.,

Petitioner,

v.

FEDERAL DEPOSIT INSURANCE CORPORATION,

Respondent.

On Petition For A Writ Of Certiorari To The United States Courts Of Appeals For The Fourth Circuit

BRIEF OF THE *AMICI CURIAE* WEST VIRGINIA BANKERS ASSOCIATION, WISCONSIN LEAGUE OF FINANCIAL INSTITUTIONS, LTD., AND BANK OF COUSHATTA IN SUPPORT OF PETITIONER

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QUESTION PRESENTED

Whether the Federal Deposit Insurance Corporation's review procedures involving deposit insurance assessments violate due process rights.

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INTEREST OF THE AMICI CURIAE

The West Virginia Bankers Association("WVBA"), Wisconsin League of Financial Institutions, Ltd., ("WLFI") and Bank of Coushatta hereby respectfully submit this brief as *amici curiae* in support of the petitioner with the consent of the parties. The signed consents of each are filed together with this brief.

Amici are a small financial institution from a small, predominately rural, state and two (2) trade associations

representing FDIC-insured institutions. The WVBA represents the interests of approximately one hundred sixty-seven FDIC-insured institutions in West Virginia. The WLFI represents the interests of fifty-three (53) state and federally chartered FDIC-insured, savings and loans and savings banks maintaining their home offices in the State of Wisconsin. Bank of Coushatta is a small bank in rural Louisiana whose case, *FDIC v. Bank of Coushatta*, 930 F.2d 1122 (5th Cir. 1991), *cert. denied*, 112 S.Ct. 170 (1991), was cited by the Fourth Circuit in affirming the termination by the Federal Deposit Insurance Corporation ("FDIC") of Doolin's federal deposit insurance. *Amici* believe that the FDIC's procedures for review of deposit insurance risk classification violate Doolin's due process rights.

The WVBA and WLFI assert that the ability of their members to protect themselves from arbitrary or erroneous risk classifications turns upon the review process available in the event of disagreement with the FDIC. Presently, there exists no means by which an FDIC-insured depository institution may challenge its risk classification *and* create a meaningful record of both the FDIC's basis for the classification and the institution's basis for challenge. Absent an effective administrative procedure to do so, subsequent reviews become meaningless, especially in view of the deference given the FDIC's interpretation in any judicial review.

SUMMARY OF ARGUMENT

As the Fourth Circuit Court of Appeals recognized, Doolin's challenges to the FDIC procedures by which an

institution seeks review of its assessment classification are fundamental to its case since the termination of insurance proceeding stems directly from Doolin's concerns regarding the risk classification.[1] The Fourth Circuit Court of Appeals reviewed the informal administrative review process through which an insured institution can challenge its risk classification. The process is informal, discretionary, and written.

In summary, the procedure available to an insured institution disputing its risk classification is to submit a written objection to the classification, including basis for the institution's belief that the assessment should be changed.[2]

This written submission must be made by the institution without the benefit of an opportunity to discover the FDIC's analysis and application of the variety of factors the FDIC considers in setting the classification.[3]

REASONS FOR GRANTING THE WRIT

The FDIC's sole obligation is to accept the additional information and then notify the institution as to whether the submission, made in a vacuum of knowledge, causes the FDIC to reconsider its risk assessment. If the FDIC does not elect to reconsider the original classification, the

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[1] *Doolin Security Savings Bank, F.S.B. v. Federal Deposit Insurance Corporation*, 53 F.3d 1395 (4th Cir. 1995), at 1401.

[2] 12 C.F.R. § 327.4(d).

[3] The FDIC considers a variety of factors in determining the risk classification. 12 C.F.R. 327.3(e).

original determination stands. The FDIC does not provide a reasoned opinion for a rejection of the request for reconsideration. The institution is left to seek judicial review of the final decision of the FDIC under the Administrative Procedure Act. At this juncture, judicial review is virtually meaningless as no opportunity exists in the administrative process for the institution to create a meaningful record for consideration by the court.

Accordingly, the FDIC informal procedure violates an institution's due process right by failing to provide a meaningful process. As the Fourth Circuit Court of Appeals noted in its opinion, "[t]he fundamental requirement of due process is the opportunity to be heard 'at a meaningful time and in a meaningful manner.' "[4]

The Fourth Circuit analyzed the due process requirements in *Mathews* and applied them to the Doolin case. The three factor test developed by *Mathews* is:

> [I]dentification of this specific dictates of due process generally requires consideration of three distinct factors: First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any of additional or substitute procedural safeguards; and finally, the Governments' interest including the function involved and the fiscal and administrative burdens that

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[4] *Doolin, supra,* at 1402, quoting *Mathews v. Eldridge,* 424 U.S. 319, 333, 96 S.Ct. 893, 902, 47 L.Ed.2d 18 (1976), (quoting *Armstrong v. Manso,* 380 U.S. 545, 552, 85 S.Ct. 1187, 1191, 14 L.Ed.2d 62 (1965).)

the additional or substitute procedural requirement would entail.[5]

The application of the three factor test to the procedural review of FDIC risk classification reveals that the informal FDIC procedure does not meet the standard of due process.

With regard to the first aspect of the test, that a private interest exists, the Fourth Circuit Court of Appeals found "Doolin's interest in its risk classification is significant because the classification affects its depository insurance assessment rate."[6] This conclusion applies equally to all depository institutions.

Next, the Fourth Circuit Court of Appeals concluded that the risk of an erroneous deprivation is minimal. The Fourth Circuit opinion provides no basis for this other than the requirement that the FDIC's risk classification be based upon a detailed evaluation of the institution. Such a basis was assumed by the Court for Doolin had no opportunity to demonstrate otherwise and the FDIC's decision did not address the issue. The *Amici* dispute that an accurate and detailed evaluation will in fact occur in each instance. Accordingly, the *Amici* dispute the conclusion that the FDIC's procedure is such that the risk of erroneous deprivation is minimal. Significantly, the FDIC's procedures do not permit an institution to develop these facts so that they may be, if necessary, ultimately reviewed by a Court. Accordingly, the *Amici* assert that additional procedural safeguards *are* necessary to assure

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[5] *Mathews, supra,* at 335, 96 S.Ct. at 903.

[6] *Doolin, supra,* at 1403.

that due process is achieved. In *Mathews*, this Court emphasized the fact that the agency in question allowed access to all information relied upon by the agency and the agency supplied a summary of the evidence it considered most relevant. The recipient then had a *meaningful* opportunity to submit challenging evidence or arguments.[7] These circumstances do not exist in the present case. The FDIC procedure to challenge risk classification requires submission of a response to the classification, without the benefit of knowing the details of the FDIC's basis for that classification.

The third element of the test set forth in *Mathews* addresses the Government's interest. Clearly, the Government has an interest in an accurate and efficient administration of the Federal Deposit Insurance funds. The FDIC's assessment of insurance premiums is clearly essential to that interest. However, the FDIC is not only the administrator of the deposit insurance funds, it is also a regulator of depository institutions. As such, it also has an interest in the day-to-day regulation and supervision of the depository institution. Accordingly, the FDIC also has a balancing interest in assuring the accuracy of the insurance risk classifications from the perspective of the overall impact on an institution, as opposed to the impact of the assessment on the insurance fund. Balancing these interests, the FDIC should afford additional, meaningful procedural opportunities for an institution challenging a risk classification to learn specific basis of that classification and to offer evidence supporting its assertion that the classification is incorrect.

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[7] *Mathews, supra*, at 346.

As indicated above, a challenge to the risk assessment classification involves procedural issues of concern to all FDIC insured depository institutions. The *Amici* believe that the Fourth Circuit Court of Appeal's conclusion in its application of the *Mathews* due process test was erroneous and that the informal FDIC review procedure denies due process to institutions seeking to challenge the risk classification. Such institutions are denied a meaningful opportunity at a meaningful time to seek reconsideration of the risk classification. By the time their objection would reach a court, the review would not be meaningful due to a lack of a record and due to the deference to which the regulator would be *per se* entitled at that point.

CONCLUSION

For the foregoing reasons, the *Amici* respectfully request the Court to grant the Petition for a Writ of Certiorari.

Respectfully submitted,

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DOOLIN SECURITY SAVINGS BANK, F.S.B., PETITIONER

v.

FEDERAL DEPOSIT INSURANCE CORPORATION

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

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24 pp

QUESTIONS PRESENTED

1. Whether the Federal Deposit Insurance Corporation (FDIC), which is responsible for agency policies regarding assessment and payment of insurance premiums into the federal deposit insurance funds, has such a direct pecuniary interest in the maintenance of those funds that it may not serve as a decision-maker in the assessment process.

2. Whether, in the absence of any disputed issue of material fact, petitioner was nonetheless entitled to a *de novo* evidentiary hearing before the agency or the district court on whether its nonpayment of deposit insurance premiums should result in the termination of its insured status.

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In the Supreme Court of the United States

OCTOBER TERM, 1995

No. 95-86

DOOLIN SECURITY SAVINGS BANK, F.S.B., PETITIONER

v.

FEDERAL DEPOSIT INSURANCE CORPORATION

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-29a) is reported at 53 F.3d 1395. The decision and order of the FDIC's Board of Directors terminating petitioner's insured status (Pet. App. 31a-46a), and the recommended order of the administrative law judge (Pet. App. 47a-58a), are reported at FDIC Enforcement Decisions and Orders ¶ 5215, at A-2453.

JURISDICTION

The judgment of the court of appeals was entered on May 18, 1995. A petition for rehearing was denied on June 13, 1995. Pet. App. 30a. The petition for a writ of

certiorari was filed on July 17, 1995. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Petitioner is a federally insured savings association, with its principal place of business in New Martinsville, West Virginia. As a "federal savings association," within the meaning of 12 U.S.C. 1464 and 1813(b)(2), and an "insured depository institution," within the meaning of 12 U.S.C. 1813(c)(2), petitioner has two federal regulators. The Office of Thrift Supervision (OTS) has primary regulatory and supervisory authority (see 12 U.S.C. 1462-1464), and the Federal Deposit Insurance Corporation (FDIC) administers the system of federal deposit insurance under the Federal Deposit Insurance Act, 12 U.S.C. 1811 *et seq.*, including the Savings Association Insurance Fund (SAIF) (see 12 U.S.C. 1821(a)(6)).

The FDIC is mandated by statute to establish a risk-based premium system for deposit insurance, such that the amount of the premiums that a depository institution pays to the SAIF must reflect the "probability that the deposit insurance fund will incur a loss with respect to the [depository] institution." 12 U.S.C. 1817(b)(1)(C)(i). Congress required the FDIC, in assessing an institution's deposit insurance premiums, to consider, among other things, the institution's assets, its liabilities, "any other factors the [FDIC] determines are relevant to assessing [the] probability" that the institution will incur a loss (12 U.S.C. 1817(b)(1)(C)(i)(III)), and "the revenue needs of the deposit insurance fund" (12 U.S.C. 1817(b)(1)(C)(iii)). Pursuant to that mandate, the FDIC has issued regulations governing the assessment of insurance premiums, 12 C.F.R. 327.4 (1995), which provide that

each depository institution will be assigned an "assessment risk classification," 12 C.F.R. 327.4(a) (1995). The regulations also provide that, in establishing an institution's risk classification, the FDIC will consider, among other things, "supervisory evaluations provided by the institution's primary federal regulator." 12 C.F.R. 327.4(a)(2) (1995).[1]

A depository institution that is dissatisfied with its risk classification may file a written request for review of the classification by the Director of the FDIC's Division of Supervision. 12 C.F.R. 327.4(d) (1995). After the review is completed, the Director must promptly notify the institution in writing of the FDIC's determination whether reclassification is warranted. *Ibid.* Judicial review of the FDIC's final decision is available under the Administrative Procedure Act (APA), 5 U.S.C. 704. See Pet. App. 36a.

A depository institution that fails to pay its insurance premiums in a timely fashion may have its insured status terminated by the FDIC. 12 U.S.C. 1818(a)(2)(A)(iii) (permitting termination for violation of "any * * * condition imposed in writing by the [FDIC] in connection with the approval of any application * * * by the insured depository institution"). If the FDIC determines that termination of insurance is warranted, it must notify the institu-

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[1] When this case was before the court of appeals, the FDIC's risk assessment regulation was 12 C.F.R. 327.3 (1994), and the provision taking supervisory evaluations into account was 12 C.F.R. 327.3(e)(1)(ii) (1994). See Pet. App. 2a n.1, 3a n.3. The FDIC subsequently redesignated and revised the regulation, effective April 1, 1995, with no changes material to this case. See 59 Fed. Reg. 67,153, 67,161-67,163 (1994); Pet. App. 2a n.1.

tion of that determination in writing, 12 U.S.C. 1818(a)(2)(B), and provide the institution with the opportunity to contest the determination in a hearing on the record, 12 U.S.C. 1818(a)(3).

Under FDIC regulations, an initial hearing on the record is held before an administrative law judge (ALJ). 12 C.F.R. 308.5, 308.119(a) (1995). The ALJ is charged with recommending a decision, 12 C.F.R. 308.5(b)(8) (1995), and may grant summary disposition if there is no genuine issue as to any material fact and the moving party is entitled to a decision as a matter of law, 12 C.F.R. 308.29(a) (1995). The FDIC's Board of Directors makes the final decision whether an institution's insured status should be terminated. 12 U.S.C. 1818(a)(3); 12 C.F.R. 308.40 (1995).

2. a. On December 1, 1992, the FDIC notified petitioner that it had been assigned an assessment risk classification of "1B" (the second most favorable classification) for the purpose of determining its deposit insurance rate for the six-month period beginning January 1, 1993. The semi-annual insurance assessment on petitioner called for by the notification was $40,651.53, due on January 31, 1993. Pet. App. 2a. The FDIC's classification of petitioner was based, in part, on a rating assigned to petitioner by a 1992 OTS examination report. *Id.* at 32a-33a.

Petitioner contended that the OTS examination report was erroneous, and that its risk classification should have been "1A" (the most favorable rating). Pet. App. 2a-3a. A classification of 1A would have resulted in a semi-annual deposit insurance premium of $32,677.37. In January, 1993, petitioner paid the FDIC $32,677.37, instead of the full $40,651.53 called for by the FDIC's notice. On two occasions, the FDIC noti-

fied petitioner that it had failed to pay its full semi-annual assessment. *Id.* at 3a.

Petitioner requested and obtained administrative review of its risk classification. The FDIC's Director of the Division of Supervision denied petitioner's request for reclassification, and, on July 7, 1993, the FDIC's Supervision Review Committee also denied petitioner's request. Petitioner did not seek judicial review of the FDIC's risk classification determination. Pet. App. 13a. When petitioner's next semi-annual insurance premium became due on July 31, 1993, petitioner again paid the FDIC an amount appropriate for a 1A, rather than a 1B, classification. *Id.* at 3a. The FDIC subsequently commenced administrative proceedings to terminate petitioner's insured status. *Ibid.*

The FDIC moved for summary disposition before the ALJ in the termination proceeding, arguing that there were no disputed issues of material fact. The ALJ agreed and granted summary disposition in a recommended order suggesting that petitioner's insured status be terminated. Pet. App. 47a-58a. The ALJ noted that petitioner had conceded that it had not paid the full amount of the deposit insurance premium that was due (*id.* at 49a-50a), and it concluded that petitioner could not challenge the classification rating assigned to it in the termination proceeding, for such a challenge could be brought only through a separate avenue of review, which petitioner had already invoked (*id.* at 51a). The ALJ also rejected petitioner's argument that the FDIC's alleged financial interest in the outcome disqualified the FDIC from determining the amount of the insurance premium. *Id.* at 54a.

b. The FDIC's Board of Directors agreed with the ALJ that petitioner's insured status should be terminated for nonpayment of the full premium. Pet. App. 31a-46a. The Board observed that the only issues before it were "whether [petitioner] has paid its insurance premium in accordance with law and regulation, and, if it has not, the FDIC's authority to terminate its deposit insurance." *Id.* at 35a. The Board rejected petitioner's attempt to contest the correctness of its insurance premium in that proceeding. *Id.* at 36a.

The Board also rejected petitioner's contention that the FDIC was required, by 12 U.S.C. 1817(g), to bring an action in district court to recover unpaid insurance assessments, rather than terminating petitioner's insured status for nonpayment by administrative action. Pet. App. 37a-38a. The Board concluded that, although the FDIC has authority to sue a depository institution in district court for nonpayment, it is under no legal obligation to do so. It held that "[t]he remedy of section 1817(g) is not exclusive and does not limit in any way the FDIC's ability to select an alternative method of redress[.] * * * Indeed, the language of section 1817(h) is clear on its face that the remedies of section 1817(g) are *in addition to* any other remedy against an insured depository institution available to the FDIC." *Id.* at 38a.

Finally, the Board rejected petitioner's argument that the termination was unlawful because it had had no opportunity to contest the amount of its premium in a full evidentiary hearing. The Board observed that "[n]o such hearing is required by statute or regulation." Pet. App. 40a. The Board also noted

that, as to the FDIC's termination of petitioner's insured status, petitioner "has been actively participating in such a formal APA hearing." *Ibid.*

3. The court of appeals affirmed the FDIC's termination of petitioner's insured status. Pet. App. 1a-29a. The court rejected petitioner's argument that the termination was illegal because the matter was decided on summary disposition, without an evidentiary hearing. The court pointed out that the FDIC had conducted a formal APA adjudication, as required by 12 U.S.C. 1818(a)(3), and that the matter had been decided on summary disposition because no material facts concerning the premium assessment were at issue. Pet. App. 11a. The court noted that "the procedure at issue specifically involved [petitioner's] termination of insurance and not the determination of its risk classification," which is not subject to formal adjudication under the APA. *Id.* at 11a n.9.

The court further rejected petitioner's contention that the FDIC's financial interest in the premium assessment violated petitioner's Fifth Amendment right to an impartial decision-maker. Pet. App. 21a-25a. The court reasoned that "finding the FDIC biased in this case would seriously undermine the ability of agencies in general to adjudicate disputes that affect their official policies." *Id.* at 24a. The court observed that the FDIC's authority to set deposit insurance premiums is circumscribed by statute, and that the FDIC's interest in maintaining the solvency of the SAIF "appears no greater than the interests of many agencies that adjudicate penalty or fee determinations in their own administrative proceedings." *Id.* at 25a.

Finally, the court rejected petitioner's contention that 12 U.S.C. 1817(g) deprives the FDIC of authority to invoke administrative procedures to terminate a depository institution's insured status. Pet. App. 25a-28a. The court observed that "[a]n administrative agency is entitled to considerable deference in selecting the remedies to enforce the policy of a statute it administers." *Id.* at 26a. Reading Section 1817(g) in conjunction with Section 1817(h), the court concluded that the remedy of suit "is not exclusive," but is "in addition to" any other remedy available to the FDIC, including the remedy of termination of insured status. *Id.* at 26a-27a.

ARGUMENT

1. Petitioner contends (Pet. 7-11) that the FDIC has such a direct pecuniary interest in the insurance premiums paid to the federal deposit insurance funds that it cannot serve as a decision-maker in the process of assessing those premiums. That contention is incorrect.

a. This court has stated on several occasions that "those with substantial pecuniary interest in legal proceedings should not adjudicate th[o]se disputes." *Gibson* v. *Berryhill*, 411 U.S. 564, 579 (1973); see *Tumey* v. *Ohio*, 273 U.S. 510 (1927). That principle applies to administrative officials. *Gibson*, 411 U.S. at 579. But the principle enunciated in *Gibson* and *Tumey* applies only to *adjudication* by such officials; it does not operate to disqualify officials acting in a prosecutorial or legislative capacity. See *Concrete Pipe & Products of California, Inc.* v. *Construction Laborers Pension Trust for Southern California*, 113 S. Ct. 2264, 2277 (1993); *Marshall* v. *Jerrico, Inc.*, 446 U.S. 238, 250 (1980). For that reason, the principle

invoked by petitioner does not disqualify the FDIC from setting the deposit insurance premiums payable by federally insured depository institutions. In setting those premiums, FDIC officials are not performing "judicial or quasi-judicial functions" (*Concrete Pipe*, 113 S. Ct. at 2277), as this Court has developed those concepts. Rather, FDIC officials are exercising regulatory authority consistent with guidelines established by Congress—first, by exercising a quasi-legislative function in establishing criteria for risk classification determinations, and, second, by performing a technical task in applying those criteria to particular depository institutions.

Congress directed that the FDIC's Board of Directors "shall, by regulation, establish a risk-based assessment system for insured depository institutions." 12 U.S.C. 1817(b)(1)(A). Congress also required the FDIC to take into account "the revenue needs of the deposit insurance fund" in establishing the system "for calculating a depository institution's semiannual assessment." 12 U.S.C. 1817(b)(1)(C)(i)(III). The regulatory structure established by Congress thus indicates that FDIC regulators exercise quasi-legislative, rather than quasi-judicial, authority when they establish risk classification criteria governing depository institutions' insurance premiums.

In determining the proper risk classification for a particular depository institution, FDIC regulators must apply their regulations to a set of facts. That action, however, is quite different from the decision-making at issue in *Tumey* and its progeny. *Tumey* itself involved a criminal prosecution before the "mayor's court" of an Ohio town (273 U.S. at 515), as

did *Ward* v. *Village of Monroeville*, 409 U.S. 57 (1972); *Gibson* involved charges of professional misconduct against optometrists tried before a Board of Optometry (411 U.S. at 567). Each case involved an adversary proceeding in which the adjudicator "hear[d] * * * witnesses and rule[d] on * * * disputed factual or legal questions." *Marshall* v. *Jerrico, Inc.*, 446 U.S. at 247. The same is not true of the system of setting deposit insurance premiums, which involves the application of technical regulations to each bank in light of the assets and liabilities of the bank, and which, like the actuarial determinations challenged unsuccessfully in *Concrete Pipe*, is not "vulnerable to suggestions of bias or its appearance." 113 S. Ct. at 2284.

b. The principles of *Tumey* are also not applicable here because only a challenge to the FDIC's termination decision was before the court of appeals, and any connection between the FDIC's termination of petitioner's deposit insurance and a financial benefit to the deposit insurance fund is "exceptionally remote." *Marshall* v. *Jerrico, Inc.*, 446 U.S. at 250; see also *Dugan* v. *Ohio*, 277 U.S. 61, 65 (1928); *Concrete Pipe*, 113 S. Ct. at 2284-2885. The amount of the deposit insurance imposed on petitioner was not at issue in the proceedings below; that amount was established in a separate, regulatory proceeding, which became final after petitioner failed to seek judicial review of the assessment under the APA. The amount of the assessment had no connection to the conclusions of the ALJ and the FDIC Board that petitioner's deposit insurance should be terminated; that conclusion was based solely on the fact, admitted by petitioner, that petitioner had failed to pay the

full amount of its premiums. Once the FDIC invoked the statutory provision for termination of deposit insurance for nonpayment of premiums (12 U.S.C. 1818(a)(2)(A)(iii)),[2] the adjudicators concluded, under a straightforward application of the statute, that petitioner's insured status should be terminated.

c. In addition, the FDIC's discretion in setting the insurance premiums is significantly circumscribed by statute, as the court of appeals recognized (Pet. App. 24a-25a). Congress directed the FDIC to set the assessments for insured institutions to maintain the reserve ratio for the fund at a specific figure, 12 U.S.C. 1817(b)(2)(A)(i)(I), which Congress designated to be either 1.25% of the total estimated insured deposits, or a "higher percentage," if the FDIC determines that circumstances "rais[e] a significant risk of substantial future losses to the fund," 12 U.S.C. 1817(b)(2)(A)(iv). The FDIC cannot, therefore, arbitrarily impose high insurance premiums on the banking industry to bolster the insurance fund.[3] Because of the statutory limits on the FDIC's discretion, there is no "significant opportunity for bias to operate." *Concrete Pipe*, 113 S. Ct. at 2285; see *Republic Indus., Inc.* v. *Teamsters Joint Council*

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[2] The decision to commence proceedings for termination of insured status is clearly not subject to the disqualification principles of *Tumey*, for that process is "prosecutorial or plaintiff-like," not adjudicative. *Marshall* v. *Jerrico, Inc.*, 446 U.S. at 248.

[3] Indeed, the FDIC recently announced that it is refunding to the banking industry approximately $1.5 billion, plus interest, in collected insurance premiums, as the funds in the bank insurance fund now exceed the 1.25% ratio. BNA Banking Daily, Sept. 6, 1995, at 6.

No. 83 of Virginia Pension Fund, 718 F.2d 628, 640-641 (4th Cir. 1983), cert. denied, 467 U.S. 1259 (1984).

d. Petitioner has made no showing that the desire to ensure financing of the insurance fund could distort the judgment of any FDIC official resolving insurance disputes. No government official stands to profit personally from the outcome of the insurance proceedings. Cf. *Marshall* v. *Jerrico, Inc.*, 446 U.S. at 250; *Dugan*, 277 U.S. at 65 (pointing out that the official in that case "receives a salary in any event, whether he convicts or acquits"). Furthermore, the FDIC's deposit insurance funds are restricted to the purpose of carrying out the deposit insurance program, and may not be commingled with any other funds. 12 U.S.C. 1821(a)(4)(A). Thus, even a decision by an FDIC official to assess an unjustifiably large insurance premium would not benefit the FDIC in the manner that petitioner suggests (Pet. 11), for the FDIC does not have a financial stake in the outcome of the case, beyond that necessary to ensure the fiscal soundness of the insurance funds. Cf. *Marshall* v. *Jerrico, Inc.*, 446 U.S. at 251.

Thus, petitioner is incorrect in arguing that the decision below conflicts with *Ward* v. *Village of Monroeville*, *supra*, and the decision of the Seventh Circuit in *United Church of the Medical Center* v. *Medical Center Commission*, 689 F.2d 693 (1982). In *Ward*, the Court held that the Mayor of Monroeville, the chief executive officer of the municipality, could not also exercise judicial powers in a "mayor's court," when "the revenue produced from [the] mayor's court provide[d] a substantial portion of [the] municipality's funds," 409 U.S. at 59, and the "mayor's executive responsibilities for village finances may [have made]

him partisan to maintain the high level of contribution from the mayor's court," *id.* at 60. In that case, the fines levied in the mayor's court went into the general municipal treasury. *Id.* at 59 n.1. Here, as discussed at p. 12, *supra*, the connection between the insurance premium assessed by the FDIC and the FDIC's level of funding is far more attenuated, for the funds obtained in the insurance program must be used for insurance purposes only.

Similarly, in *United Church of the Medical Center*, the court of appeals concluded that a local government entity was disqualified from adjudicating a title reverter proceeding, when the outcome of that proceeding could have resulted in the reversion of substantial property to the entity "without cost to [it] even though the property has valuable improvements on it, and in the event of subsequent sale of the property, the proceeds redound[ed] to the coffers of the [governmental unit]." 689 F.2d at 699. The court held that the local government's temptation to enrich its coffers was sufficiently great to disqualify it from ruling on the reverter proceeding. As the court of appeals in this case remarked (Pet. App. 24a), however, the same contention cannot be reasonably made here, given the limits on the FDIC's discretion in setting the level of the fund.

e. The court of appeals observed that "finding the FDIC biased in this case would seriously undermine the ability of agencies in general to adjudicate disputes that affect their official policies." Pet. App. 24a. The FDIC is charged by Congress with administering the deposit insurance funds and ensuring the soundness of those funds; Congress has also directed that the funds be financed through

deposit insurance premiums. The FDIC is the obvious candidate to establish the amount of those premiums and to take action against a depository institution that refuses to make full payment. The FDIC has an institutional interest in ensuring the success of the regulatory program that Congress has assigned to it, but such an interest is hardly a disqualifying bias, nor does it render the FDIC "incapable of adjudicating disputes * * * given the strong public interest in effective, efficient, and expert decisionmaking in the administrative setting." *Id.* at 25a. This Court has recognized that federal bank regulatory agencies have a legitimate interest in ensuring the soundness of the insurance funds covering deposits in federally insured banks and savings associations. See *United States* v. *Gaubert*, 499 U.S. 315, 328, 333 (1991).

This Court has stated that "[w]e must start * * * from the presumption that [government officials] are unbiased," and "[that] presumption can be rebutted [only] by a showing of conflict of interest or some other specific reason for disqualification." *Schweiker* v. *McClure*, 456 U.S. 188, 195 (1982); see *Withrow* v. *Larkin*, 421 U.S. 35, 47 (1975). "[T]he burden of establishing a disqualifying interest rests on the party making the assertion." *Schweiker* v. *McClure*, 456 U.S. at 196. But the government "cannot be disqualified from decisionmaking on grounds of bias when all that is alleged is a general bias in favor of the alleged state interest or policy." *Hammond* v. *Baldwin*, 866 F.2d 172, 177 (6th Cir. 1989). The FDIC's statutory mission to ensure adequate funding for the deposit insurance funds therefore does not disqualify it from establishing the

level of contributions that insured institutions must make to those funds, or terminating the insured status of those institutions that refuse to do so.

2. Petitioner contends (Pet. 12) that any "party to an administrative agency adjudication has a right to an evidentiary hearing at some point, either a formal hearing before the agency or a trial *de novo* in district court." That contention is incorrect, as is petitioner's related contention that the decision below conflicts with decisions of this Court, the Ninth Circuit, and the District of Columbia Circuit.

a. Petitioner contends (Pet. 14-15) that the FDIC violated the APA's requirements for a hearing on formal adjudication (5 U.S.C. 556) when the ALJ concluded that there were no issues of material fact warranting an evidentiary hearing and recommended a summary disposition in favor of the FDIC on the termination of petitioner's deposit insurance. The APA does not, however, require a pointless evidentiary hearing to be held when there are no material, disputed issues of fact to be resolved—just as the Federal Rules of Civil Procedure do not require a trial to be held in the absence of any disputed issue of material fact. Cf. Fed. R. Civ. P. 56. "Common sense suggests the futility of hearings where there is no factual dispute of substance. * * * [Thus,] an agency may ordinarily dispense with a hearing when no genuine dispute exists." *Veg-Mix, Inc.* v. *United States Dep't of Agriculture*, 832 F.2d 601, 607 (D.C. Cir. 1987). "The precedents establish * * * that no evidentiary hearing is required where there is no dispute on the facts and the agency proceeding involves only a question of law." *Citizens for Allegan County, Inc.* v. *FPC*, 414 F.2d 1125, 1128 (D.C. Cir.

1969). The FDIC was not required to hold an evidentiary hearing on the termination of petitioner's deposit insurance, for it was undisputed as a matter of fact that petitioner had failed to pay the required full amount of deposit insurance. That failure meant that the FDIC was entitled to prevail as a matter of law.

Contrary to petitioner's contention, the decision below does not conflict with *Marathon Oil Co.* v. *EPA*, 564 F.2d 1253 (9th Cir. 1977). In that case, the court held that the EPA's issuance of effluent permits under the Clean Water Act was a formal adjudication to which the requirements of 5 U.S.C. 556 apply (including the requirement that evidence outside the record not be considered). The court stated that, when agency proceedings are conducted "to adjudicate disputed facts in particular cases," the requirements of formal adjudication generally apply. 564 F.2d at 1262. In this case, however, there were no "disputed facts" to be adjudicated, and therefore a full hearing was not necessary. Indeed, the Ninth Circuit has elsewhere held that, even in cases arising under a governing statute that requires an opportunity for a hearing and a decision on the record in an administrative adjudication, such a hearing is required only when " 'material' issues of fact are raised 'that should not be dispelled at the outset without a hearing.' " *Pineapple Growers Ass'n* v. *FDA*, 673 F.2d 1083, 1086 (9th Cir. 1982).

b. Petitioner also contends that, in the absence of a full evidentiary hearing before the agency, it was entitled to a *de novo* hearing on its contentions in district court. As the court of appeals held (Pet. App. 26a-27a), however, the governing statute gives the FDIC the discretion to choose between proceeding

against petitioner administratively, by terminating its deposit insurance, and proceeding against it in district court, by suing to recover the unpaid insurance premium assessments. See 12 U.S.C. 1817(h) (remedies specifically provided by statute, including right to sue in district court, "shall not be construed as limiting any other remedies against any insured depository institution, but shall be in addition thereto").[4]

The D.C. Circuit's decision in *Callejo* v. *RTC*, 17 F.3d 1497 (1994), is not to the contrary. In that case, the court construed 12 U.S.C. 1821(f) to provide that the Resolution Trust Corporation could make a final administrative decision on the insured status of any bank deposit (subject to the usual principles of judicial review under the APA) or, in the absence of agency regulations providing for such an administrative decision, could require the district court to decide the question of insured status in a *de novo* proceeding. The D.C. Circuit did not suggest that a party to an administrative proceeding has a right to an *evidentiary* hearing in district court whenever an agency decides a matter on summary disposition, and such a ruling would be inconsistent, not only with the APA, but also with Rule 56 of the Federal Rules of Civil Procedure, which authorizes summary judgment to be entered when the moving party is entitled to judgment as a matter of law.

Nor does the decision below conflict with *Coit Independence Joint Venture* v. *FSLIC*, 489 U.S. 561 (1989), or *United States* v. *First City National Bank*

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[4] Petitioner has not argued in this Court that a *de novo* hearing in district court is required by the Due Process Clause.

of Houston, 386 U.S. 361 (1967), as petitioner contends. *Coit* held that the statute governing the Federal Savings and Loan Insurance Corporation (FSLIC), the FDIC's predecessor in insuring deposits of federal savings associations, did not give the FSLIC the authority to adjudicate creditors' claims against insolvent savings associations, and that the district courts had original jurisdiction to consider such claims *de novo*. 489 U.S. at 572-579. *Coit* did not involve formal adjudications under the APA, however, and did not address the propriety of summary procedures in such adjudications.

First City National Bank held that, in a district court suit brought by the United States under the Clayton Act and the Bank Merger Act to prevent a merger of banks, the courts were required to consider *de novo* the question whether the public interest would be advanced by the merger, and should not defer to the decision of the Comptroller of the Currency on that question. The Court stressed that, "in antitrust actions involving regulated industries, the courts have never given presumptive weight to a prior agency decision, for the simple reason that Congress put such suits on a different axis than was familiar in administrative procedure." 386 U.S. at 367. The Court noted that the statutory language at issue did "not express the conventional standard, *i.e.*, whether the agency's action is supported by substantial evidence," that governs judicial review of formal agency adjudications. *Ibid.* Although the Court observed that the Comptroller's action had been "informal," and that no hearing had been held or record "in the customary sense" compiled (*id.* at 368), it did not suggest that a *de novo* judicial hearing

would be required in cases like this one, where the agency's decision is subject by statute to the APA's requirement of formal adjudication, but there are no facts for the agency to adjudicate at an evidentiary hearing. Neither *First City National Bank* nor *Coit*, therefore, is relevant to this case.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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Supreme Court of the United States

October Term, 1995

DOOLIN SECURITY SAVINGS BANK, F.S.B.,

Petitioner,

v.

FEDERAL DEPOSIT INSURANCE CORPORATION,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Fourth Circuit

REPLY BRIEF TO BRIEF FOR THE RESPONDENT IN OPPOSITION AND SUPPLEMENTAL BRIEF

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ARGUMENT

The Brief for the Respondent in Opposition ("Resp. Br.") deals with only three issues: (1) whether the due process rights of the petitioner, Doolin Security Savings Bank, F.S.B. ("Doolin"), were violated as a result of the financial interest of the respondent, Federal Deposit Insurance Corporation ("FDIC") (Resp. Br. 8-15), (2) whether Doolin had a right to an evidentiary hearing *on the termination of Doolin's deposit insurance* (Resp. Br. 15-16), and (3) whether Doolin had a right to a trial *de novo on the termination of Doolin's deposit insurance* (Resp. Br. 16-19).

Nowhere does the Government dispute Doolin's position that (1) Doolin did not violate a "law or regulation" by withholding the disputed portion of the FDIC's assessment of Doolin; (2) Doolin was entitled to an evidentiary hearing *with respect to its deposit insurance assessment;* and (3) the FDIC's *assessment procedures* violated Doolin's due process rights apart from the financial interest of the decisionmaker.

Although the Government's brief straightforwardly disputes that the FDIC was constitutionally disqualified as a decisionmaker by its financial interest, the Government's arguments on (1) whether Doolin had a right to an evidentiary hearing in connection with the termination of Doolin's deposit insurance, (2) whether Doolin had a right to a trial *de novo,* and (3) whether Doolin had an opportunity to challenge the FDIC's assessment in district court are anything but straightforward.

The Government seeks to avoid certiorari in this case, but it recently has demonstrated a likelihood that it will

seek certiorari in *Rapaport v. United States Dept. of the Treasury, Office of Thrift Supervision*, 59 F.3d 212 (D.C. Cir. 1995), which is analogous to this case in that both arise under 12 U.S.C. § 1818 and both involve enforcement actions initiated because a private party failed to pay money as ordered by a federal banking agency.

I. THE GOVERNMENT'S BRIEF ADVANCES ARGUMENTS THAT ARE NEW TO THIS CASE AND ARE AT ODDS NOT ONLY WITH THE FDIC'S ARGUMENTS BELOW, BUT WITH THE DECISION OF THE COURT OF APPEALS.

The Government's Brief advances theories neither argued by the FDIC below nor adopted by the court of appeals. In so doing, the Government now takes positions not only at odds with the positions the FDIC argued in the court of appeals, but at odds with the decision of that court. These changes in position are a further demonstration that the court of appeals erred in upholding the termination of Doolin's deposit insurance.

A. Respondent's Theory That Agency Action Becomes Final *After* The Failure To Seek Judicial Review In District Court Was Neither Argued To The Court Of Appeals Nor Adopted By It And Is Plainly Wrong.

Although the court of appeals held that Doolin had an opportunity to challenge the FDIC's risk-based assessment by an action in district court, App. 18a-19a, it did not characterize either the FDIC staff's assessment or the intra-agency review of the assessment as "final agency

action" within the meaning of 5 U.S.C. § 704.[1] In fact, the court of appeals specifically noted that the FDIC Board had never determined the issue. Pet. App. 5a n.5. Yet without finding that there had been final agency action, the court of appeals held that Doolin "could have sought APA review of the decision of the FDIC Supervisory Committee." Pet. App. 18a. It was its holding that Doolin could have obtained judicial review of an agency action that had not become final that led the court of appeals to conclude that the FDIC procedures satisfied due process.

The Solicitor General takes a different approach from that of the FDIC and the court of appeals. The Government now recognizes that finality is a *prerequisite* to judicial review under the APA. The Government argues that the FDIC staff's adjudication of Doolin's risk category "became final *after* petitioner failed to seek judicial review of the assessment under the APA." Resp. Br. at 10 (emphasis added). This novel position is advanced as a part of an effort to avoid dealing with the APA and due process issues involving the assessment, but instead the theory simply confirms that the assessment was not immediately reviewable in district court under 5 U.S.C. § 704.

In the instant case the FDIC's assessment was an intermediate agency action that became reviewable not

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[1] Section 704 of Title 5, U.S.C. provides, in part: "Agency action made reviewable by statute and final agency action for which there is no other remedy in a court are subject to judicial review. A preliminary, procedural, or intermediate agency action or ruling not directly reviewable is subject to review on the review of the final agency action."

"after petitioner failed to seek judicial review" under 5 U.S.C. § 704, but "on review of the final agency action." *See Board of Governors of the Federal Reserve System v. McCorp Financial, Inc.*, 502 U.S. 32, 43-44 (1991) ("If and when the Board finds that McCorp has violated that regulation, McCorp will have, *in the Court of Appeals*, an unquestioned right to review of both the regulation and its application."(emphasis added)). Under *McCorp*, the FDIC's assessment, like the order in *McCorp* requiring the transfer of assets, would only be reviewable in the context of the review of the agency's final order in the court of appeals. *See also Rapaport v. United States Dept. of the Treasury, Office of Thrift Supervision*; 59 F.3d 212 (D.C. Cir. 1995); *Wachtel v. OTS*, 982 F.2d 581 (D.C. Cir. 1993); and *Akin v. OTS*, 950 F.2d 1180 (5th Cir. 1992), which involved judicial review in the courts of appeals under 12 U.S.C. § 1818(h) of orders requiring payment of money to the Resolution Trust Corporation.

B. The Government's Argument That Doolin Violated A Condition Imposed In Writing Demonstrates That Doolin Did Not Violate A Statute Or Regulation.

Until this point the FDIC's position has been that Doolin's withholding of deposit insurance assessments was a "violation" of a statute and a regulation within the meaning of 12 U.S.C. § 1818. Pet. App. 34a. This is the basis on which the court of appeals upheld the FDIC's termination of Doolin's deposit insurance. Pet. App. 26a n.20. The Government's brief now abandons that theory and argues instead that Doolin violated a "condition imposed in writing by the [FDIC] in connection with the approval of

[an] application . . . by the insured depository institution." Resp. Br. at 3. This novel position is not advanced accidentally, but to allow the Government to avoid the APA issues.

First, the "condition in writing" theory is advanced as a part of an argument that what happened before the FDIC constituted something other than an APA "adjudication."[2] By seeking to characterize the FDIC's deposit insurance assessment as a "condition imposed in writing," the Government can argue that FDIC's assessment of Doolin was not an "order" and that neither the FDIC's assessment nor the intra-agency review of the assessment was an "adjudication" within the meaning of the APA. Instead, as George Orwell might have put it, the FDIC was merely "performing a technical task in applying [criteria for risk classification determinations] to [a] particular depository institution." Resp. Br. at 9.

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[2] The APA defines "adjudication" as "agency process for the formulation of an order." 5 U.S.C. § 551(7). The APA defines "order" as "the whole or a part of a final disposition, whether affirmative, negative, injunctive, or declaratory in form, of an agency in a matter other than rule making but including licensing." 5 U.S.C. § 551(6).

Throughout the Solicitor General's brief, the Government studiously avoids using the terminology of the APA. Thus, the assessment becomes a "premium," Resp. Br. 3, 4, 5, 6, 7, 8, 9, 10, 11, 13, the adjudication of Doolin's assessment category becomes an "assessment process," Resp. Br. (I), the "process of assessing the premiums," Resp. Br. 8, "a technical task in applying [the FDIC's regulation] to particular depository institutions," Resp. Br. 9, "determining the proper risk classification," Resp. Br. 9, "setting deposit insurance premiums," Resp. Br. 10, "impos[ing]" "the amount of the deposit insurance," Resp. Br. 10, or "the insurance proceedings," Resp. Br. 12.

Second, the "condition in writing" theory is put forth as a way to overcome the fact that Doolin did not violate a law or regulation.[3] As Doolin demonstrated in its Petition for a Writ of Certiorari, neither 12 U.S.C. § 1818 nor any other statute cited by the Government indicates that the withholding of funds is a "violation" *of a statute or regulation*, which is what Doolin was charged with violating. *See* Pet. 3 n.1 and Pet. App. 34a.

II. CERTIORARI IN THIS CASE IS MORE APPROPRIATE THAN IN *OFFICE OF THRIFT SUPERVISION V. RAPAPORT*

The linchpin of the court of appeals' analysis under the Due Process Clause, which was similar to the Fifth Circuit's analysis of the FDIC's capital directive procedures in *Bank of Coushatta*, 930 F.2d 1122 (5th Cir.), *cert. denied*, 502 U.S. 857 (1991), is that bank examinations do not involve credibility assessments. Pet. App. 16a. Yet the very statute invoked by the FDIC, 12 U.S.C. § 1818, specifically provides for such hearings. *See, e.g., Rapaport v. United States Dept. of the Treasury, Office of Thrift*

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[3] Section 1818(a)(2)(A)(iii) authorizes termination-of-insurance proceedings, *inter alia*, where an insured depository institution has "violated any applicable law, regulation, order, [or] condition imposed in writing in connection with the approval of any application or other request by the insured depository institution." This statutory language is substantially identical with the language of 12 U.S.C. § 1818(b), which was involved in *Rapaport v. United States Dept. of the Treasury, Office of Thrift Supervision*, 59 F.3d 212 (D.C. Cir. 1995); *Wachtel v. OTS*, 982 F.2d 581 (D.C. Cir. 1993); and *Akin v. OTS*, 950 F.2d 1180 (5th Cir. 1992).

Supervision, 59 F.3d 212 (D.C. Cir. 1995); *Wachtel v. OTS*, 982 F.2d 581 (D.C. Cir. 1993); and *Akin v. OTS*, 950 F.2d 1180 (5th Cir. 1992), all of which dealt with whether private parties could be ordered to pay money to a federal agency under 12 U.S.C. § 1818. All three cases involved plenary hearings with evidence concerning the amount of the money that would be awarded. *E.g.*, *Rapaport*, 59 F.3d at 214 ("Finally, Rapaport claims that the OTS miscalculated Great Life's capital deficiency because it improperly valued certain loans."); *see also First National Bank of Bellaire v. Comptroller of the Currency*, 697 F.2d 674, 686 (5th Cir. 1983); Lawrence G. Baxter, *Administrative and Judicial Review of Prompt Corrective Action Decisions by The Federal Banking Regulators*, 7 Admin. L.J. Am. U. 505, 562 (1994): "[I]t is common for examiners to testify in formal enforcement proceedings. They often are subjected to vigorous cross-examination."

On September 28, 1995, the Solicitor General requested additional time within which to file a petition for a writ of certiorari in *Rapaport v. United States Dept. of the Treasury, Office of Thrift Supervision*, 59 F.3d 212 (D.C. Cir. 1995). *See* Application for an Extension of Time Within Which to File a Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit, *United States Dept. of the Treasury, Office of Thrift Supervision v. Rapaport*, filed Sept. 28, 1995 (No. 95-3-305). In *Rapaport*, the Office of Thrift Supervision ("OTS") sought to require the payment of money for "violation" of an agreement that was the result of a "condition imposed in writing in connection with an application."

In *Rapaport*, the Government will attempt to overturn *Wachtel v. OTS*, 982 F.2d 581 (D.C. Cir. 1993), in which the

OTS unsuccessfully sought to require the payment of money for "violation" of a "condition imposed in writing in connection with an application." 982 F.2d at 582. Thus, *Rapaport* also deals with the ability of the federal banking agencies, including the FDIC, to use 12 U.S.C. § 1818 to require the payment of money to a government agency. Indeed, the Solicitor General's Application in *Rapaport* indicates that the FDIC is being consulted with respect to the decision whether to seek certiorari in *Rapaport*. *Id.* at 2.

A petition for a writ of certiorari in *Rapaport* will raise issues concerning the federal banking agencies' ability to define the boundaries of their powers under 12 U.S.C. § 1818. Embedded within *Rapaport* is the issue whether the failure to pay money to a government agency can constitute a "violation" within the meaning of 12 U.S.C. § 1813(v), an issue decided against Doolin in the court of appeals. Pet. App. 26a.

A reversal of the court of appeals' decision in *Rapaport* would provide the FDIC with an administrative remedy that it would in all likelihood have used against Doolin if it had thought the power existed. If the Government succeeds in *Rapaport* it would be appropriate to remand the instant case to the FDIC for a reconsideration of its decision in light of this Court's decision in *Rapaport*. Accordingly, it would be appropriate to defer consideration of the petition in this case until the Court considers any petition in *Rapaport*. *See Keney v. New York*, 388 U.S. 440 (1967), where this Court delayed consideration until a decision was reached in a case raising similar issues, and to grant the writ in this case rather than *Rapaport*.

CONCLUSION

For the foregoing reasons, Doolin respectfully urges the Court to grant the Petition for a Writ of Certiorari.

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